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ABSTRACT

This report is a compilation of presentations made at the Personnel Management Institutes held by the New York State School Boards Association in the fall of 1974. Included are the following six presentations: "New Laws Affecting School Boards and School Administration," by Bernard T. McGivern; "How to Prepare for Tenure Hearings, PERB Hearings, Commissioner of Education Hearings, and Others," by Edward T. Green; "The Consumer Price Index, Its Strengths and Weaknesses," by William T. Grainger, Gene E. Laber, and Loren M. Solnick; and "Current Court Decisions, PERB Decisions, Commissioner's Decisions," by Raymond G. Kuntz. (JG)

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PERSONNEL MANAGEMENT INSTITUTES

A Compilation of the
Presentations Made at the
Institutes Held in
September and October, 1974

Stanley B. Hinman, Jr., Director of Personnel Relations

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New York State School Boards Association, 111 Washington Ave., Albany, N.Y. 12210

FOREWORD

We are pleased to furnish this report of presentations made at the Personnel Management Institutes.

Personnel management has become one of the major concerns of school boards and administrators.

The timeliness of this subject and its importance are reflected by the stature of the speakers who were willing to make themselves available to our Association to bring you an important message.

GEORGE HILLMAN

President

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NEW LAWS AFFECTING SCHOOL BOARDS AND SCHOOL ADMINISTRATION

Bernard T. McGivern

The past year has produced important changes in the law, and interesting interpretations of the law, insofar as school boards and administrators are concerned. These changes and interpretations will have a real impact on your personnel policies during the year ahead.

Let us first consider the changes in the Taylor Law itself. Chapter 443 of the Laws of 1974 changed the Taylor Law in two respects.

First of all, the school board is no longer required to hold a legislative hearing before it takes action to establish the terms and conditions under which employees will work for the district during the ensuing year. The school board may take such action as soon as the parties have finished with fact-finding.

Secondly, the Legislature made it clear that none of the powers and duties of school boards shall be considered to be curtailed or diminished by the provisions of the Taylor Law.

Previously, it was understood that the language of §209 of the Taylor Law, establishing impasse procedures to be followed when no agreement is reached by the parties, required that all of the procedures, including the legislative hearing, must be concluded before the legislative body acts unilaterally to establish terms and conditions of employment.

Now that the requirement of a legislative hearing has been removed from §209, the school board may undertake to establish terms and conditions of employment as soon as the parties have completed fact-finding. If one or both parties do not accept the fact-finder's report, the school board may wait a few days to learn whether or not PERB intends to schedule an information hearing.

If no word is received from PERB in this connection, the board may go ahead and establish the terms and conditions of employment by adopting salary schedules, leave policies, and the like.

For all intents and purposes, the board of education must have reached decisions with respect to such matters prior to the finalization of the budget. In order to submit a budget for approval, the school board must have a fair idea of what salaries it expects to pay to its employees and what fringe benefits it intends to give the employees in the year ahead.

Although it is not necessary to actually adopt a salary schedule prior to the commencement of the new school year, the establishment of a salary figure in the budget eliminates virtually all flexibility on the terms of such schedule.

In a recent publication, PERB has indicated that it would be considered an improper practice for a school board to establish terms and conditions of employment different from those existing in the preceding year where no agreements have been reached by the employees and the chief school officer.

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This is what PERB calls its Triborough Doctrine. This doctrine was overruled by the courts last year in the Poughkeepsie case (44 AD 2d 598).

The second section of Chapter 443 of the Laws of 1974 made it clear that the Legislature agreed with the courts that the Triborough Doctrine should not apply in the public sector.

Once fact-finding has been completed, there are no more impasse procedures to be followed by the parties. Since the parties have exhausted their impasse procedures, there is no need for further negotiating. At this point, the board of education is free to proceed with the decision making that is necessary to constructing a budget for submission.

There have also been changes in the law with respect to tenure. Chapter 735 of the Laws of 1974 reduced the probationary period for teachers to three years. This act will take effect on October 1st of this year. Any district which has teachers who have completed three years' probationary service, or who will complete three years of probationary service on or before October 1, 1974, should immediately consider whether such teachers ought to be continued in the employment of the district on a permanent basis.

Any teacher who continues to be employed after October 1st, 1974, and who has served at least three years of the probationary term, will attain tenure by estoppel.

At this point, I should call to your attention a recent decision by the Court of Appeals wherein it was determined that tenure must be granted on a broad grade level basis, except in certain special subject areas. In other words, the Court of Appeals recognized the traditional tenure areas and has held that no school district could define tenure more narrowly than the traditional tenure areas, in the absence of some guidelines established by the Board of Regents (Matter of Baer vs. Nyquist, 357 NYS 2d 442).

The State Education Department is now in the process of formulating rules whereby the school districts will be guided in preparing more narrowly defined tenure areas. In the meanwhile, any teacher who is granted tenure may prove to be a real burden upon the district.

Until the Regents have made it possible for school districts to grant tenure on the basis of proven competence, a teacher of Latin who is granted tenure may someday, when her position is abolished, bump a good chemistry teacher out of her position even though the Latin teacher does not know a test tube from a Bunsen burner.

In light of this Court of Appeals decision, it might be well for school districts to avoid appointing teachers on tenure until the districts have been enabled to establish tenure areas which are more narrowly defined and better related to the demonstrated competence of the teacher.

While we are discussing the subject of tenure, it is appropriate to call your attention to an amendment of the law in respect of the appointment of members of the administrative and supervising staffs of school districts. You will remember that the law was changed in 1972 to permit school districts

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to enter into contracts with such personnel for terms of from one to five years.

Chapter 952 of the Laws of 1974 requires that school districts grant contracts to all such persons beginning July 1, 1975. Such contracts shall have a term of one to three years where the employee has not been with the district for more than three years.

Once such an administrator or supervisory employee has been with the district in excess of three years, the contract shall be for not less than three nor more than five years.

Probably most districts already have contracts with their administrators who have served the district in excess of three years. In any event, such contracts will be required for these employees beginning with the next school year.

An interesting aspect of this change in the law is that it virtually precludes the possibility of negotiating with any group of such employees. Inasmuch as the law requires a separate contract for each of such employees, and the contract must be recommended by the superintendent of schools and approved by a majority of the board of education, it is difficult to see how any negotiations could be carried on by the chief school officer and a bargaining unit made up of such employees.

Whether your district is entering upon individual contracts with administrators, negotiating agreements with groups of employees, or simply adopting bylaws which establish terms and conditions of employment, you should be keenly aware of the legal prohibitions against discrimination on account of sex.

Last year, we called attention to various decisions by the courts and determinations by the Division of Human Rights in respect of sex discrimination. The trend of those decisions and determinations indicated that school districts would be prohibited from requiring teachers to take maternity leave at some point during pregnancy and indicated that cleaning women should be paid the same wages as janitors doing the same kind of work.

The proposed Regulations of the Department of Health, Education and Welfare, promulgated in implementation of Title IX of the Education Amendments of 1972, set the stage for future decisions and determinations.

These regulations forbid discrimination on account of marital or parental status and require that disabilities related to pregnancy be treated in the same way as other physical conditions or temporary disabilities.

It appears that no classes, including physical education, may be offered separately on the basis of sex. It will be unlawful to require boys to take shop and girls to take home economics, or to operate separate home economics or shop classes for boys and girls.

Varsity sports may not be limited exclusively to male students; and although the school may not be required to provide women access to men's teams, it must furnish the women with separate opportunities to participate in competitive athletics of comparable type, and level of competition.

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It appears, therefore, that school districts must pay female teachers who coach teams in the same manner that the districts pay male coaches of school teams.

It would seem that no differentiation may be made on account of sex, other than separate toilets and showers (and where these are maintained separately, they must be equal in extent and quality).

The regulations of HEW should be finalized within the next two months; and thereafter we can expect that court decisions and determinations by the Division of Human Rights will be closely patterned after the HEW regulations even where the case is brought pursuant to the state statutes.

In order to avoid future problems, it would be well for school boards to begin a review of all individual contracts, negotiated agreements, salary schedules, fringe benefits (including health insurance programs), recruitment policies, employment policies, sick leave policies and program offerings to be sure that the chief school administrator and the school board are bending over backwards to eliminate any and all awareness of sex, much less discrimination on the basis of sex.

Before leaving the subject of tenure, I would like to remind all school districts that probationary teachers may only be discharged upon recommendation of the chief school officer and action by a majority of the board of education.

Many school districts, during the past year, have discontinued the services of probationary teachers in a very informal manner.

Both the Commissioner of Education and the courts have made it clear that the school district must continue to pay salary to any probationary teacher who is let go during the probationary period without formal action by the board of education, unless the district can show that the position of such teacher was abolished and that there is no probationary teacher with less seniority than the one who was discontinued.

At the end of a probationary period, the services of a probationary teacher may be discontinued without formal action by the board of education. If the superintendentent has not recommended a probationary teacher for tenure, the school district is powerless to continue such probationary teacher as an employee of the district.

Although a case involving the city of Yonkers did suggest that the board of education may appoint a teacher to tenure, even though the superintendent has not recommended such teacher, this position has not been approved by the higher courts of the state of New York.

The courts will, however, recognize tenure by estoppel in those cases where a probationary teacher is continued in employment after the probationary term, even though no action was taken by either the superintendent or the board of education to grant tenure to the teacher. It is important that we keep this in mind in light of the shortened probationary period now in effect for all teachers in our school districts.

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During the past year, the constitutionality of §3020-a was tested in the federal courts. This is the section which provides for hearings in respect of tenured teachers on charges which could result in discipline or removal. The federal court in the Kinsella case determined that this section, absent proper administrative regulations, would be unconstitutional.

The Education Department immediately proceeded to amend its regulations in such a manner as to meet the requirements of the federal court.

Thereafter, the courts were called upon to determine whether it would be unconstitutional to suspend a tenured teacher without pay during the pendency of a hearing pursuant to §3020-a. In Matter of Jerry vs. Syracuse Board of Education, the New York court took judicial notice of the Kinsella case and determined that it might be a denial of due process to suspend a teacher without pay even though the amendment of the Commissioner's regulations had rendered §3020-a of the Education Law constitutional.

Shortly afterwards, and on April 16, 1974, the United States Supreme Court decided the case of Arnett vs. Kennedy (42 L.ED.2d 15), where it was held that there was no denial of due process in suspending a public employee pending the hearing on charges brought against him. Subsequently, a supreme court in this State decided in Wolfson vs. Wappingers Central School District that the Jerry case was no longer binding and that a tenured teacher could be suspended pending the outcome of a tenure hearing.

Moving on to the subject of money, Chapter 241 of the Laws of 1974 made a substantial change in the state aid formula. The changes made in the formula are difficult to understand in certain respects and the computation of aid is no easy task. I will not attempt to analyze here each of the 27 sections of the new law.

The end result of these many changes can be easily stated.

First of all, it is encouraging to note that the Legislature has recognized the fact that it costs more than $860 to educate a pupil in our public schools. The $1,200 figure used in this chapter is a far more realistic number.

Secondly, the Legislature has recognized that it costs substantially more to educate handicapped pupils and vocational students. This recognition took the form of weighting factors for different types of pupils enrolled in the public schools.

Thirdly, the Legislature also recognized the value of summer school programs and evening programs by providing state aid to these undertakings. We have long urged that state aid be given for programs which make a better use of school facilities.

Finally, the Legislature recognized the need for an increase in aid to all districts by providing for a minimum increase of eight percent per pupil based on the aid paid in the school year 1973-1974.

It is interesting to note that of the 702 school districts analyzed, 61 will take advantage of the minimum increase, 592 will be limited by the

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maximum increase and only 49 will actually be on formula. This means that about six out of seven school districts will realize approximately 15 percent increase in state aid during the coming year.

Although this is a substantial amount of money, the rate of inflation appears to be almost equal to the rate of increase in state aid. The average district receives about half of its money from state aid and must raise the other half in local taxes. There is little likelihood that local taxpayers will agree to increase their participation to the same extent that the Legislature did this year.

Not only will the local taxpayers have difficulty in matching the increase in state participation in school costs, but other changes in the law will nibble away at some of the additional state aid.

The State does not pay the full cost of transporting pupils (even over the minimum distances) and, for that reason, the provisions of Chapter 755 of the Laws of 1974 will prove to be an expense to the districts. This change in the law requires transporting nonpublic school pupils up to a distance of fifteen miles.

Chapter 593 of the Laws of 1974 also requires school districts to provide nonpublic school pupils with vocational programs and special programs for handicapped children. Although state aid is provided for such programs, the state aid will not pay the whole cost.

Compliance with Chapter 34 of the Laws of 1974, in respect of routing school buses in a manner that will not cross railroad tracks which are unguarded; compliance with Chapter 449 in respect of special construction of facilities to accommodate handicapped persons; and the application of Chapter 1004 of the Laws of 1974, relating to partial exemption from taxation by persons 65 years of age, will have a financial impact on each school district.

There are some changes in the law which may result in savings to school districts, such as Chapter 269 of the Laws of 1974 which authorizes the district to contract for the operation, maintenance, and garaging of district-owned buses; but these savings will be more than offset by new mandates, such as the "sunshine" law or Freedom of Information Law (Chapters 578, 579, and 580 of the Laws of 1974).

Perhaps this is a good point at which to consider the implications, for school districts, of the Freedom of Information Law. Although school districts are not "agencies" as defined in the law, they are subject to those provisions which relate to "municipalities".

After September 1st of this year, school districts will be required to make available to the public virtually all records maintained by the district from and after September 1, 1974. Since these records will be difficult to separate from other records of a like nature maintained by a district, the school districts will probably make all records available without regard to the effective date of this chapter.

Each school district should immediately begin to promulgate rules and regulations pursuant to which persons shall be permitted to inspect records

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and pursuant to which the persons charged with keeping such records shall make certified copies for persons who request copies.

Reasonable fees may be charged for any copies produced and certified to by the school district.

School districts should also begin an itemized listing of all records kept or maintained by the district in order that persons desiring information may refer to the published index for the purpose of ascertaining the records which they should inspect or copy. Some interim general guidelines have been produced by the Committee on Public Access to Records, and copies of such guidelines may be obtained from the Association offices.

Some special provisions are contained in the new law with respect to payroll records. The Freedom of Information Law provides that all payroll records will be made available when requested by a member of the news media on a form approved by the State Comptroller. Such a form has already been produced and a copy of the approved form can also be obtained from the Association offices.

The law does not contain any criteria by which school authorities may determine who is a bona fide member of the news media. It appears, therefore, that district officers must recognize anyone who claims to be a member of the media and who supplies the approved form.

Actually, §2116 of the Education Law has required that school districts make salary information available to any taxpayer of the district, and the Freedom of Information Law does not expand upon this requirement.

Not only does the Freedom of Information Law require that the minutes of meetings be available to citizens, such records must also show exactly how each member of the board of education voted on every issue to come before the board. This would include all disciplinary proceedings, contracts, and other matters concerning which the board takes official action.

The Freedom of Information Law, together with §2116 of the Education Law, will make virtually all information in respect of employees of a school district available to the public. The provisions of subdivision 3 of §87 of the new law do not protect such information on the basis of "personal privacy" except as to medical records and credit history of an employee.

There is one kind of record which may be withheld pursuant to §438 of Part C of the General Education Provisions Act recently adopted by the Congress and signed into the law by the President.

This new provision of federal law prohibits a school district from denying any parent (or pupil after he has attained majority) the right to inspect and review any and all official records related to a pupil, including all test scores, psychological data, background information, teacher observations, and the like.

School districts are required to establish procedures whereby parents may have access to their children's school records under the new law. In addition,

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parents will be given an opportunity to challenge the content of such school records and to provide for the correction of any inaccurate or misleading data contained therein.

By the same token, the new federal law prohibits a school district from making any of a pupil's records available to any other person without first deleting the name of the pupil and any other identifying information.

Reading the Freedom of Information Law, together with the new federal statute, it seems clear that school districts can deny anyone, with the exception of parents or an adult pupil, information concerning a particular pupil of the school district.

The statistical information contained in all of the pupil records, which is in any way used by the school district for the purpose of constructing classes or designing programs, must be made available for public inspection; but the statistical information must exclude the names of the pupils and any other information which might identify a pupil or pupils with any part of such information.

In short, it appears that school districts ought to make just about every kind of information and record available to any member of the public, with the exception of personal information concerning any pupil of the district.

The additional record keeping and services required by the Freedom of Information Law will surely be a substantial expense to school districts. I expect that the new Article 19-A of the Vehicle and Traffic Law (Chapter 1050 of the Laws of 1974) will also represent an expense to school districts.

This new article of the Vehicle and Traffic Law is entitled "Special Requirements for Bus Drivers". The record keeping, testing, and reporting on bus drivers will be expensive.

School districts must review the driving record of each bus driver annually and arrange for biannual medical examinations of all bus drivers and provide for regular observation of the driver's defensive driving performance while operating his vehicle. There must be a biannual driving test conducted by supervisory personnel or some competent outside agency.

In addition, the school district must require each bus driver to complete a written or oral examination testing his knowledge of the rules of the road and driving practices. The school district is further required to submit an affidavit to the Commissioner of Motor Vehicles each year stating that the district has complied with all of the provisions of this new article of the Vehicle and Traffic Law.

An interesting provision of the new law is the requirement that no bus driver consume any intoxicating liquor, regardless of its alcoholic content, within four hours before going on duty; and the school district is required to keep any driver from going on duty if "by his general appearance or by his conduct or by other substantiating evidence, he appears to have consumed an intoxicating liquor within the preceding four hours".

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I can just imagine the grievances which will be filed against any school district that attempts to carry out its responsibilities under this section in a conscientious manner. At the same time, the school district will be subject to a substantial fine in the event it violates any provision of this new article.

Perhaps the requirements of this article, in respect of bus drivers, will cause more districts to take advantage of the new law permitting school districts to contract for the operation, maintenance and garaging of their school buses.

There have been many other important changes in the law during the past year having to do with the registration of voters, the filing of nominating petitions and the ordering of names on the ballot. These changes, however, do not have much direct impact on negotiations or personnel policies of the district. Since our time is limited, it might be well to save these other changes in the law for discussion during the general session.

HOW TO PREPARE FOR TENURE HEARINGS, PERB HEARINGS, COMMISSIONER OF EDUCATION HEARINGS, AND OTHERS

Dr. Edward T. Green

Just prior to the opening of school, a rather distraught mother called our office and asked, "What is the first day of school?" Immediately, the answer "chaos" was given.

The same situation can apply to tenure hearings unless careful preparation has been made.

Even though each chief school officer and the school board have been advised on the details before, it might be helpful to review the law and the Commissioner's Regulations in this matter. I have found that our assumptions that everyone knows the details just aren't true. Only when someone is faced with a problem does he scurry to learn the details of the procedures to be followed.

Tenure hearings were established by Chapter 717 of the Laws of 1970, which added §3020-a to the Education Law. Section 82 of the Commissioner's Regulations established the procedures for such hearings. The timetable pertaining to these hearings is as follows:

A. A charge is filed with the board and the board meets to consider the charge.

B. If probable cause is found, the tenured employee must be served with a written copy of the charge by certified mail. Also, there must be a copy of the document entitled "The Rights of Tenured School District Employees to a Hearing on Charges Provided by Section 3020-A Education Law."

C. The employee, within ten days, must notify the school district whether he desires a panel hearing — or wishes to waive his right to such hearing.

   1. If he fails to act or waive his right, a hearing must be held;
   2. If he waives his right, the board must determine the case within 15 days.

D. Upon receipt, by certified mail - from the school district clerk, of a copy of the notice of the need for a hearing — which shall include:

   1. the name of the panel member chosen by the board,
   2. the place to be provided for the hearing, and
   3. the name and address of the board's attorney, if any, who will represent the claimant at the hearing,

the employee has five days to notify the Commissioner and the board,

by certified mail, of his selection for the panel (otherwise the Commissioner will select a panelist).

E. The Commissioner will then schedule a hearing to be held in the school district or the county seat within 20 days. He will advise each party of the date, time, and place of the hearing, and the identity of the hearing officer.

F. No less than five days prior to the scheduled hearing date, the panelists selected by the parties shall, by certified mail or telegram, notify the Commissioner of the name of the third panel member.

G. The panel hearing will be conducted by the hearing officer. Here, a caution should be noted: Strict rules of evidence, i.e. "relevant", "competent", and "material", need not—and usually do not—apply. This freedom in procedure can create real problems for all parties.

H. If a public hearing is requested by the employee or his attorney, such a request must be made, in writing, to the hearing officer at least five days before the hearing.

A CAUTION: Prudent selection of the hearing location can prevent a "circus atmosphere".
Example: The auditorium or gymnasium of the secondary school where the teacher is employed. Imagine, if you will, the pressure on a witness who must testify in the presence of his peers.

FURTHER CAUTION: The hearing officer must remain in control of the situation at all times. The audience must not be allowed to disturb or interrupt the proceedings.

Photographs and recordings may not be made at private hearings. The hearing officer may permit them at public hearings. At the hearing, no question may be addressed to the employee unless he has been sworn as a witness with his own consent. (I can recall one case where the opportunity to question the witness could have resulted in a completely opposite effect in the outcome.)

I. The findings and recommendations of the panel on each charge are to be submitted to the hearing officer no later than the adjourned date of the hearing—not more than 14 days after the conclusion of the testimony.

PROBLEM: Preparation of the transcripts may require more time and, thus, may not be ready for review by the panelist.

Under the revised regulations of the Commissioner (based upon the Kinsella vs. Board of Education and Nyquist decision),

1. The board of education shall be provided with a transcript of the

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proceedings before the Hearing Panel.

2. The board shall be required to render a written decision setting forth the reasons and factual basis for its determination, and

3. Such determination of the board shall be based solely upon the record in the proceedings before the Hearing Panel.

The burden, then, is upon the complainant and the board—in the first instance—to have a supportable case. Here I would like to share some elements of several cases—without mentioning names and indicating at the outset that these comments are based upon my information and understanding of each situation. Later, in my discussion, I will refer to some recommendations which may be of help to the board's panelist.

District A — This case related to fraud as it applied to the misuse of sick leave. Two employees were working in the field of selling—as well as carrying out their full-time teaching duties—and wished to attend an annual sales conference in a mid-western city. (Here we should note that each individual shall be charged separately and the panel should hear only one individual's case. The same panel may not hear more than one case at the same time. Thus—two persons, two panels, two hearings.)

Leave for attendance at this conference was denied. Then, in order to attend, claim for sick leave on the part of the individual or a family member was made. This prompted a report from a faculty member to the building principal, who, in turn, called the superintendent. Immediately, the superintendent employed a private detective to follow these persons to the conference.

Documentary evidence in the form of the photographs of the hotel registration, one employee and his wife in the hotel lobby, the employees in attendance at the conference, and other items which would pinpoint the employee's location in the conference city at a particular time and place was collected. To cap the entire performance, the detective rode back to the airport in the same limousine with the district employees and their wives. During the trip, the employees were congratulating themselves on the success of their escapade.

Suffice it to say, the evidence was very damaging. On the day of the scheduled hearing, the panel was present, the hearing officer was ready to convene the hearing. The district's witnesses were available—located throughout the building so as not to be too obvious.

Prior to the opening of the hearing, the attorneys requested a conference with the hearing officer. Confronted with selected items of evidence, a settlement was reached. While the employees were not discharged, they were disciplined and the full hearing was not held.

I wish to emphasize the importance of a meticulous gathering of evidence. The weight of the evidence had, in my opinion, a direct bearing on the outcome of this case.

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District B — This case dealt with the failure of an employee to comply with reasonable requests. At the outset, the depth of the district's preparation for the hearing appeared in the volume of documentation which was arrayed on a table in the hearing room. The full depth was not apparent until the documents were introduced into evidence.

As the case unfolded, it became very clear that the attorney and the district administrators had been very thorough in their preparation for this hearing.

On what was to be, hopefully, the last day of the hearing, the attorneys requested a conference. A settlement, which involved the removal of the employee, resulted, prior to the final determination of the case by the panel.

By way of documentation, it is well to note that memorandums from all parties were a valuable part of the record. Much of the contention was based upon the failure of the employee to sign annual evaluations even though his lengthy memorandums to the superintendent provided ample evidence that he had received the evaluations.

District C — This is what we facetiously refer to as the "cannibal" case. Briefly stated, jokingly or otherwise, a pupil—or pupils—made reference to false teeth and asked the teacher if his teeth were false. In order to give evidence that his teeth were natural, the teacher proceeded to bite the questioner.

This incident erupted into a real controversy culminating in the determination of probable cause for the charges and the resultant hearing. The teacher requested a public hearing.

Imagine, if you will, the pressures upon pupil witnesses who were testifying in the presence of their peers. There were, while school was in session, several hundred persons in the audience—many of whom were sympathetic to the teacher.

The testimony did not indicate any consistent pattern of irrational behavior on the part of the teacher. In the absence of such evidence, no member of the panel felt that the individual should be terminated in his employment—even though his wisdom in the instance was in question.

District D — The charge in this instance dealt with inability to perform properly the tasks of teacher in the classroom because of emotional instability.

Throughout the hearing, no direct testimony relating to actual classroom performance was introduced. Further, the "expert" testimony was in disagreement and did not indicate, in any case, that the teacher was permanently incapacitated and could not again return to the classroom.

Absent any direct testimony which indicated that this teacher had not carried out the duties of a teacher, the findings were in favor of the teacher.

The point of this case was that very little testimony was introduced which related to the classroom behavior. And—it is understandable that ex-

pert testimony based upon one visit can be at variance with the testimony of a practitioner in whose care the teacher had been for a considerable period of time.

At this point, let me recall for you the pamphlets and forms which are necessary for these hearings. I would caution that the procedures be followed carefully so that the findings would not be upset on a technicality.

STATE EDUCATION DEPARTMENT MATERIALS

Pamphlets — 1. "The Rights of Tenured School District Employees to a Hearing on Charges Provided by Section 3020-A Education Law"

2. "Timetable—Section 3020-A Education Law Hearings on Charges Against Tenured School District Employees"

3. "The Role of the School District Clerk Section 3020-A Education Law"

4. "Procedures for Selection of Panel Member—Section 3020-A Education Law"

Forms

3020-A-1 Notice of Determination of Probable Cause on Charges Brought Against Tenured School District Employees—Section 3020-A Education Law

3020-A-1-B Supplemental Notification of Board Vote Determination of Probable Cause (One for each charge)

3020-A-2 Request by Tenured School District Employee for Hearing Before a Panel on Charges Brought Against the Employee Section 3020-A Education Law

3020-A-3 Notice of Waiver of Hearing by Tenured School District Employee—Section 3020-A Education Law

3020-A-4 Notice of Failure to Request—or to Waive Hearing

3020-A-5 Notice of the Need for a Hearing on Charges Against a Tenured School District Employee (To the Commissioner of Education)

3020-A-6 Notification of Board Selection of Panel Member

3020-A-7 Notification of Employee Selection of Panel Member

3020-A-8 Notification of Selection of Third Panel Member

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As I see them, some of the reasons for tenure hearings seem to be:

1. A clear cut case of misconduct—sufficiently grave to warrant dismissal. Please note an emphasis on the words "sufficiently grave."

2. A desire to have a third party—in this case, the Hearing Panel—make recommendations to ease the pressure on the board and the chief school officer.

3. To test cases to clarify the statutes and regulations.

Now, what can be said about preparing for such hearings? Of the two charges—"Conduct Unbecoming a Teacher" has a much better chance for success than has the charge of "Incompetency".

Actually, preparation begins far in advance of any hearing—clearly stated district rules and regulations, job descriptions, board policies, and consistent behavior on the part of administrators and supervisors are vital!

A number of cases have been decided upon "due process". The equal protection doctrine of the Fourteenth Amendment and the concept of "liberty" under the first eight amendments apply. Let me, then, make reference to several cases. Please note that these were outside the state of New York. Later in the program you will hear specific reference to New York State cases.

A number of decisions have been based upon a board's discretionary powers. It should be remembered that the board of education, as a legally constituted body, does have certain such powers.

Under procedural due process, your evaluation procedures can be the boon to—or the bane of—your existence. Properly conceived, and applied with equitable treatment, they can be the backbone of a strong case. Let me share with you some thoughts along this line by citing several cases—merely to show the reasons used in the removal of a tenured employee—together with some reasons for success or failure in the attempts.

The first, Wasilewski vs. Milwaukee — based upon the evaluation of teaching method. This case turned on the charge of conduct unbecoming a teacher. It was charged that the teacher had talked about sex in a speech class. The teacher was fired and this action was upheld based upon the argument that his handling of the topic was such a violation of recognizable standards of propriety as to constitute bad behavior.

The principle involved here is that if a case is to be built upon failure to use acceptable procedures, the procedures must be well established and the teacher must be informed of the criteria—in advance—upon which judgment shall be made.

The second is Melby vs. Kiley (Massachusetts). Here the teacher was fired based upon the charge that a four-letter word had been written on the board and discussed as a taboo word for 15 minutes. In this instance, the teacher was sustained.

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This decision was based upon the same principle which was applied in the previous case; the difference being that the school district had not informed the teacher that the method of instruction was not acceptable.

Had the school board decided that this was a method not to be used in that district and so notified the staff, despite the fact that certain expert testimony supported it, the teacher could have been dismissed and the district's action sustained.

The third case was Acanfera vs. Montgomery County. In this instance, a homosexual was transferred from a teaching position to an administrative position when it was discovered that he was a homosexual. (I don't know the implications of that transfer.)

If we consider this in the light of criteria for the evaluation of instructors, it must be shown that homosexuality directly affects the person's teaching ability.

In this particular instance a great deal of notoriety had been given to this individual and to the school district.

The first court held that excessive notoriety plus falsification of an application for employment (I cannot cite the specific item of falsification— this can be found in the reading of the case transcript) were sufficient grounds for dismissal.

On appeal, the Court of Appeals held that the falsification charge, by itself, was sufficient cause for dismissal.

A fourth case Scheelhaase vs. Woodbury Central Community School District 349 FS 988, 1972 — 11/2/72, appealed to the Eighth Court of Appeals 488 F. Reporter 2nd session 237, 1973 — 11/28/73 and filed with the United States Supreme Court May 7, 1974.

This originated in the state of Iowa. The school district was on notice that it was no longer approved by the stated accrediting agency. A new superintendent was hired. He was given one year to meet the accreditation requirements. In evaluating the pupils' progress, two series of tests were used — the Iowa Test of Basic Skills and the Iowa Test of Basic Educational Development. It was found that this teacher's pupils did not perform well on three tests within these series.

However, in this instance it was held that the board had certain discretionary powers and the court would not substitute its judgment for that of the board.

The last case which I wish to use deals with free speech. This decision makes reference to Tinker. The citation is Amburquey vs. Cassady, 370 F.Supp. 571 (1974), in which a United States district court upheld the dismissal of a teacher found to have been excessively critical and derisive of school authorities in the use of abusive language made known to other teachers and school staff personnel.

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In the decision, the court pointed out — and I quote — "It is the view of this court a distinction exists between the obligation of society to take the risks inherent in statements of personal views on issues, as proscribed in Tinker vs. Des Moines Independent School District, (393 US 503 at page 508) and insulting and profane personal statements about individuals not touching upon factual issues of public or private concern. The First Amendment has never been a shield for intemperate personal villification of another."

As stated previously, these cases are cited to illustrate the kinds of charges which can be brought and the rationale upon which the decision turns. Anyone contemplating charges would be well-advised to do thorough research on cases involving similar charges.

A reference which might be of help is:

The Constitution and American Education — Morris, West Publishing Company, St. Paul, Minnesota 55102

To follow along with these citations, we have some additional information which may be of interest.

In your packet of materials is a reprint of an article written by Dr. H. C. Hudgkins, Jr., entitled "The Law and Teacher Dismissals" and published in the March 1974 issue of Nation's Schools. It has been reprinted with permission.

I realize that each of you is literate and can read — probably much better and faster than I. Nevertheless, I am reminded of the old adage that the road to Hades is paved with good intentions and they often include our intent to read something which gets buried deeper and deeper in the pile, and, ultimately, is never read at all.

So, let me just restate the ten commandments which Professor Hudgkins has prepared.

TEN COMMANDMENTS YOU BETTER NOT BREAK
THE LAW AND TEACHER DISMISSALS

1. Don't fire a teacher who has been arrested for possessing marijuana unless you have proof he can no longer function effectively in the classroom.

2. Don't fire a teacher whose discussion of religion stirs up a local furor unless he is advancing or inhibiting a particular faith.

3. Don't fire a teacher for incompetency on the basis of poor student test scores, alone.

4. Don't fire a teacher solely for being a homosexual unless his sexual inclination adversely affects teaching performance.

5. Don't fire a teacher for criticizing the school administration unless he is using the classroom to advance his own gain or to promote a special interest.

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6. Don't fire a teacher for insubordination unless school regulations are clearly stated or reasonably understood.

7. Don't fire a teacher for using too much creative freedom unless your restrictions were stated clearly and specifically beforehand.

8. Don't fire a tenured teacher without first knowing the nitty-gritty of tenure.

9. Don't fire a teacher for refusing to salute the flag.

10. Don't fire a teacher who brings alcohol into the school unless you can prove "just cause"

    a. There must be evidence of misbehavior
    b. The teacher's action must be somewhat analogous to misbehavior for which there exists specific statutory provisions.

In previous sessions, I have referred to evaluation as an important tool in preparing for tenure hearings and have, then, left the topic with the assumption that everyone knew and understood the use and value of evaluative techniques. Comment received from persons in attendance at these sessions have caused me to expand upon this particular item.

There are many philosophies and techniques involved in the evaluation process. Regardless of your particular philosophy, I submit that good procedures are absolutely essential to a viable system of evaluation.

I would contend that you are on much more solid ground when you define clearly your objectives, the description of the job, and the procedures to be followed in evaluating the degree to which the objectives are being met.

Let me, then, discuss an appraisal plan.

One objective of such a plan should be to build a better job understanding between the appraiser and the person being appraised.

I'd suggest that such appraisal plans should:

1. Be specific.
2. Establish a time aspect—when is something accomplished?
3. Provide for the measurability of outcome—what are the desired or expected results?
4. Determine what is to be done—how is the objective to be accomplished?
5. Determine who is responsible for accomplishing the objective.
6. Define the constraints which may limit the appraisee in accomplishing the objective, which might include:

    a. Budgetary
    b. Role and Responsibilities of Individuals
    c. School Board Policy
    d. Authority

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7. Under what conditions is the objective to be accomplished?
8. Is the objective worth doing? (Compatible with organizational goals.)

There is a fallacy which we should recognize — frequently, we work under the premise that we can observe all teaching.

There is a difference between observation and seeing!

To follow along with the concept of procedural due process, let me deal, briefly, with the role of evaluation as a tool—especially as you feel that you have a staff member whose performance is not acceptable.

1. To begin with, it is important that you need to identify what it is that you are looking for. Here you should establish the criteria and notify the staff ahead of time as to what these are.

2. Then it is important that you are consistent in your use of the criteria—that they are applied across the board. With respect to this, when there are requirements to be met or deficiencies to be corrected, be sure to notify the employee early and give a period of time for compliance. If this procedure is successful, the real product should be a good employee. This possibility is enhanced, further, if the tone of the initial letter or memorandum is in the form of a counselling document.

3. Once criteria have been established and disseminated to the staff, there should not be further need to repeatedly advise people that the policy exists.

   Notification of deficiencies should be in writing. These should be given to the employee. At the same time, it is not necessary to submit all the documentation. But—don't hold any of the deficiencies back.

4. The employee must have an opportunity to correct the deficiencies. In this respect, a time certain for correction should be set and the importance of remedying the deficiencies should be stressed.

5. If the deficiency is based upon an observable act where other observations might be helpful, by all means arrange for other persons to observe and provide input.

6. In your discussion with the employee indicate that the conference is a matter of record. Whatever is being discussed will be used in a continuing appraisal of his work.

7. Following your conference, a letter setting forth the areas of agreement should be provided for the employee and made a part of the record. If there is a communication, with which you disagree, from the employee, be sure to respond to this.

8. Reevaluation of the employee's performance at regular intervals is very important. This provides you with a check on the person's

progress as well as giving you clues as to other possible changes which might be desirable.

9. If all the efforts have not been as successful as you might wish and you reach a decision that the teacher should be removed, there is no point in being reluctant to take this step. Remember—your main objective must be to provide the best possible education for the boys and girls in your school system.

10. Many people have asked about suspension and when it should take place. As a rule of thumb, I'd suggest that you suspend only if there is a possibility of continuing harm to the pupils, the teacher, or to others in the building. Stated another way, the standard rule is that there is a potential for immediate and continuing harm if the person remains.

    There is always the danger that suspension may have the appearance of prejudgment. This could have some serious ramifications if the charge is criminal in nature.

In the process of removing an employee, if the person chooses to resign, be sure to get two letters. The first should be a formal resignation; the other should stipulate that the resignation comes after seeing the statement of charges and that the choice was made to resign. Your only agreement with the teacher should be that you would not release the letter indicating the deficiencies unless the employee chooses to abrogate the agreement with you.

Here, again, let me emphasize the need to reduce your discussions to writing. Memories are short and understandings are clouded with the passage of time. Oral statements fall into this trap. Written documents are necessary to the building of your case. Further, documentation must have a chronology which can stand the test of legitimacy. If you wish to minimize the charge of harassment, you cannot make a sudden change in your evaluation of a person. One who was very satisfactory the previous day very seldom undergoes that drastic a change overnight.

Earlier, I referred to several recommendations which I would like to make. They are:

1. That each board of education should provide to the New York State School Boards Assocation a synopsis—and such other information as to procedure, etc.—of each tenure hearing. This will provide a case record file which may be used for reference by boards of education and their attorneys.

2. The panel member selected by the board of education should be briefed thoroughly by the chief school officer and/or the attorney for the board so that he might be better acquainted with the case and better prepared to question witnesses.

3. Boards contemplating tenure hearing action would be well advised to consult with NYSSBA (Messrs. McGivern or Hinman) before proceeding—rather than at a later date when the case may appear to be going

badly, or when the findings and recommendations seem to be counter to the board's feelings. It is assumed that prior to proceeding in this matter, the board and chief school officer will have sought and followed the advice of the school district's legal advisor.

In closing, I am convinced that a well-prepared and well-documented case built upon valid reasons for dismissal is the best insurance for a favorable decision.

Too much is at stake to treat such matters lightly!

THE CONSUMER PRICE INDEX, ITS STRENGTHS AND WEAKNESSES

William T. Grainger

BACKGROUND

The Consumer Price Index (CPI) was initiated during World War I at the request of President Wilson as a means of solving labor-management disputes over wages in the war industries. The Bureau of Labor Statistics (BLS) of the U. S. Department of Labor, the agency responsible for the index, began publication of indexes for 32 individual cities in 1919, and in 1921 began regular publication of U. S. city average indexes, with estimates back to 1913. Since that time the index has undergone considerable revisions, with changes in coverage, collection, and calculation procedures, all designed to improve the index.

DESCRIPTION

The CPI is a statistical measure of changes in prices of goods and services bought by urban wage earners and clerical workers, including families and single persons. It is prepared monthly by the BLS staff with data for the current month available about three weeks after the close of the month. It is commonly referred to as the cost-of-living index. Price change is the most important cause of changes in the cost of living, but there are other factors (consumer expectations, family size, etc.) which affect the cost of living. The CPI does not indicate how much families actually spend to defray living expenses. The BLS series on urban family budgets reflects these other factors.

The official title of the CPI is Consumer Price Index for Urban Wage Earners and Clerical Workers. The Index, therefore, represents price changes as they affect these classes of workers. This group includes craftsmen, foremen and kindred workers, such as maintenance men and school bus drivers; clerical and kindred workers; service workers such as cafeteria or lunchroom workers; sales workers; and laborers. It does not include professional, technical and kindred workers, such as teachers and engineers; managers and officials.

The Index represents price changes for everything people buy for living: food, clothing, housing (both rent and home ownership), fuel and utilities, household furnishings, transportation costs, medical care, personal care, and recreational goods. It includes taxes directly associated with the purchase of an item and its continued ownership such as sales and excise taxes and real estate taxes, but excludes income and other personal taxes.

CPI is based on prices of about 400 items selected to represent the movement of all goods and services purchased. These comprise the "market basket" and represent the thousands of goods and services in our economy. The list of items priced includes all the most important goods and services and a sample of the less important ones. The content of this market basket in terms of items, quantities and qualities is kept constant so that month-to-month changes in the Index are due solely to price changes. The prices are obtained in urban portions of 39 major metropolitan areas and 17 smaller cities, chosen to represent all urban places in the U. S., and are collected from about 18,000 establishments where the wage earner and clerical worker buy goods and services —grocery and department stores, restaurants, repair shops, beauty shops, etc.

The current month's price for each item is compared with the previous month's. Price increases and decreases for all items are then combined, using appropriate weights which indicate the importance of the item to the total market basket cost. These weights which reflect the buying patterns of consumers were derived from data on a survey of consumers called the Consumer Expenditure Survey (CES). This survey is conducted periodically (roughly about every 10-12 years) and provides detailed data on the kind, qualities, and amounts of all goods and services bought by each consumer unit and the annual amount spent for each item. The 1960-1961 survey included about 4,350 families and over 500 single workers. The 1972-1973 survey is currently under way.

The Index measures price changes from a designated reference date, called the base of the index. The present base is the year 1967. Previous bases were 1957-1959 and 1947-1949. Base years are changed during major revisions (every ten years) and help to make the Index more relevant to the current period. The base year is equal to 100.0.

Month-to-month movements of the Index are usually expressed as percent changes rather than changes in index points, thereby permitting valid comparisons of price changes between different indexes. Percent changes over a designated period can be obtained by subtracting the Index for the earliest month of the period from that of the latest month of the same period, dividing by the Index of the earliest month of the period, and multiplying by 100 to obtain percent value.

BLS calculates a monthly index representing all urban places in the U. S. (U. S. City Average), and a separate index for 23 areas. Two of these include portions of New York State. The Buffalo index reflects price changes in the urban portion of the Buffalo Metropolitan Area and is published quarterly in February, May, August, and November. Many users of the New York-Northeastern New Jersey index do not clearly understand what area it represents. This index measures price changes in New York City, Nassau, Suffolk, Rockland, and Westchester counties in New York State and several counties in northeastern New Jersey. It does not measure price changes in New York State as a whole.

USES OF THE CPI

The CPI is used by the general public to understand the impact of price changes on the family budget. It is used as a measure of changes in the purchasing power of the dollar in order to adjust pensions, welfare payments, etc. It is used extensively in various economic analyses to convert current dollars to constant dollars (removal of inflationary effect from current dollars). A primary use of the CPI is in labor-management contracts to adjust wages, and some wage contracts incorporate automatic adjustments based on changes in the Index.

LIMITATIONS OF THE CPI

The CPI is based on samples of consumers, items, and areas. It is not an exact measurement of price changes, and is, therefore, subject to sampling errors. Larger samples reduce sampling error, but the cost would be prohibitive. The bureau believes that the Index is sufficiently accurate for most of the practical uses made of it.

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The Index is also subject to errors in reporting, but these are minimized by the bureau's well-trained staff.

The CPI represents average movement of prices, but not necessarily changes in prices paid by one family or a small group of families, or socio-economic groups (differences in consumption patterns).

The index is not directly applicable to any other occupational group or to nonurban workers.

The CPI measures changes in price, not changes of other factors which affect family living expenses.

The CPI is affected by changes in quality of items. New products are introduced which differ substantially from products previously on the market, preventing direct price comparisons. Such changes are difficult to identify. BLS has special procedures for adjusting prices for quality. However, the Index is still affected by residual effects of these changes.

Area indexes cannot measure interarea differences in living costs, but only show differences in rates of price change from one period to another.

CPI AND THE SCHOOL BOARD

The school board is beset by pressures on two fronts. On one hand, the teachers and other employees are demanding increases due to the impact of inflation on their living expenses. On the other hand are voters who must approve the school budget and who are determined to resist any additional costs which they believe they can control.

Certain points should be considered:

During periods of rapid inflation, the use of the CPI can have a considerable impact on wage agreements.

Choice of a particular area index should be undertaken with care, due to differences in rates of change.

Incorporation of automatic adjustments in a wage contract based on changes in the CPI can create serious problems in budget control. Some consideration should be given to specifying limits of increases in the contract.

ALTERNATIVES

The Bureau of Labor Statistics has developed a set of consumer price indexes which measure price change in urban areas grouped by size of population. These indexes permit comparisons of price changes for areas with different size populations with the U. S. city average. Historical data on these indexes indicate that the rate of price changes tended to be greater in the larger urban population classes than in the smallest.

The urban family budget series, developed by BLS, illustrates three different levels of living based on estimates of costs for different specified

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types and amounts of goods and services at each level for a precisely defined urban family of four. Costs are included not only for the goods and services incorporated in the Consumer Price Index, but also such items as contributions, social security and personal income taxes. Data are available for urban United States averages and metropolitan as well as nonmetropolitan areas. Indexes from this series reflect not only differences in price levels, but differences in consumption patterns and personal income tax liabilities, and the area indexes further reflect differences in climate and types of transportation facilities. The one disadvantage of this series is that estimates are not available for current price levels due to the time required to compute the budget costs for each area.

OUTLOOK FOR IMPROVEMENT IN THE CPI

BLS plans to issue two indexes beginning in April 1977. The present CPI, which now covers about 45 percent of the total population, will be updated and continued. A new index, called Consumer Price Index for Urban Households, will also be published and will cover about 80 percent of the population, thereby providing a comprehensive measure of price change for the entire economy. Both indexes will, according to BLS, include a new "market basket" of goods and services, new weights and a new sample of stores.

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CONSUMER PRICE INDEX
(1967=100)

	United States			New York City Area			Buffalo Area		
		% Increase Over Prev.			% Increase Over Prev.			% Increase Over Prev.	
	Index	Mo.	Yr.	Index	Mo.	Yr.	Index	Qtr.	Yr.
1972									
January	123.2	0.1	3.4	128.6	0.5	5.0	---	---	---
February	123.8	0.5	3.7	129.6	0.8	4.9	124.9	1.5	4.4
March	124.0	0.2	3.5	130.1	0.4	4.7	---	---	---
April	124.3	0.2	3.4	130.4	0.2	4.7	---	---	---
May	124.7	0.3	3.2	130.2	0.2	4.4	126.1	1.0	3.9
June	125.0	0.2	2.9	131.0	0.2	3.9	---	---	---
July	125.5	0.4	3.0	131.4	0.3	3.6	---	---	---
August	125.7	0.2	2.9	131.7	0.2	3.8	126.8	0.6	3.2
September	126.2	0.4	3.3	132.9	0.9	4.2	---	---	---
October	126.6	0.3	3.4	133.2	0.2	4.5	---	---	---
November	126.9	0.2	3.5	133.3	0.1	4.5	128.6	1.4	4.5
December	127.3	0.3	3.4	133.7	0.3	4.5	---	---	---
Annual Average	125.3	---	3.3	131.4	---	4.4	126.6	---	3.9
1973									
January	127.7	0.3	3.7	133.8	0.0	4.0	---	---	---
February	128.6	0.7	3.9	135.0	0.9	4.1	130.3	1.3	4.3
March	129.8	0.9	4.7	136.5	1.2	4.9	---	---	---
April	130.7	0.7	5.1	137.5	0.7	5.4	---	---	---
May	131.5	0.6	5.5	138.1	0.4	5.6	133.2	2.2	5.6
June	132.4	0.7	5.9	139.1	0.7	6.1	---	---	---
July	132.7	0.2	5.7	139.2	0.1	5.9	---	---	---
August	135.1	1.8	7.5	141.7	1.9	7.6	136.6	2.6	7.7
September	135.5	0.3	7.4	142.3	0.4	7.1	---	---	---
October	136.6	0.8	7.9	143.1	0.6	7.4	---	---	---
November	137.6	0.7	8.4	144.4	0.9	8.3	138.6	1.5	7.8
December	138.5	0.7	8.8	145.9	1.0	9.1	---	---	---
Annual Average	133.1	---	6.2	139.7	---	6.3	134.7	---	6.4
1974									
January	139.7	0.9	9.4	146.8	0.6	9.7	---	---	---
February	141.5	1.3	10.0	149.0	0.1	10.4	144.2	4.0	10.7
March	143.1	1.1	10.2	150.8	1.2	10.5	---	---	---
April	144.0	0.6	10.2	150.9	0.1	9.7	---	---	---
May	145.6	1.1	10.7	152.5	1.1	10.4	147.7	2.4	10.9
June	147.1	1.0	11.1	153.8	0.9	10.6	---	---	---
July	148.3	0.8	11.8	154.6	0.5	11.1	---	---	---

Source: United States Bureau of Labor Statistics

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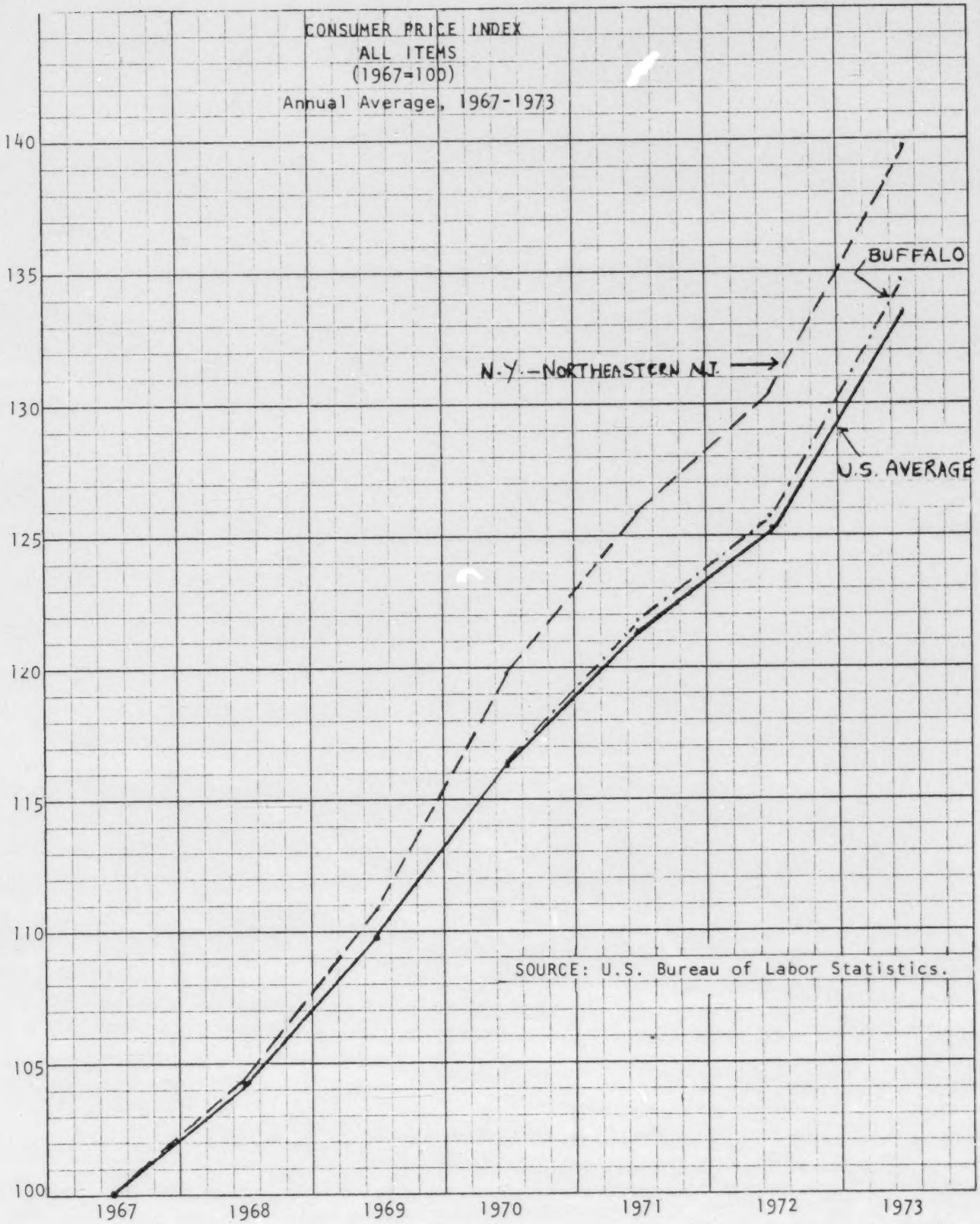

THE CONSUMER PRICE INDEX, ITS STRENGTHS AND WEAKNESSES

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Dr. Gene E. Laber

It is no doubt safe to say that scarcely a day passes in our lives when we fail to hear or see references to inflation, rising prices, or reduced purchasing power of the dollar. The communications media are telling us what we can already see on a personal level — the prices we pay for goods and services are going up. An issue of no small import, of course, is the extent of these price changes.

Economists have a deceptively simple definition of inflation. Inflation is a rise in the general price level. I refer to that definition as deceptive because it is quite easy to remember but very hard to implement. In 1974 the American economy is producing goods and services that total about $1.4 trillion in annual value at current prices. Making up that $1.4 trillion of output is a mind-boggling array of individual goods and services, most of which have a price attached. How do we in a single number — or even five or six numbers — summarize the behavior over time of those millions of prices? In practice, the answer is that we summarize with price indices.

A price index for a single good is a relatively straightforward concept: the price of the good or service in any one year is expressed as a percentage of the price of the same good or service in a "base" year. For example, if haircuts cost $2.00 in 1956 and $3.00 in 1960, the 1960 price index is 150 on a 1956 base (3.00 ÷ 2.00 x 100). The base period, of course, has an index value of 100 (2.00 ÷ 2.00 x 100). Now if the price of haircuts rises to $4.00 in 1965, the price index for haircuts goes to 200 (4.00 ÷ 2.00 x 100). Looking at the price index for 1965, we can say that haircuts have increased 100 percent since 1956; between 1956 and 1960 haircuts rose by 50 percent (50 ÷ 100 x 100), and between 1960 and 1965 they rose 33 percent (50 ÷ 150 x 100).

Conceivably such an index could be constructed for every single good or service in the economy. On a more restrained level, the Bureau of Labor Statistics indeed publishes individual price indices for about 400 goods and services that are purchased by consumers, as well as many indices for goods purchased in wholesale markets and by businesses. Table I shows the indices for several goods in April 1974 on a 1967 base, as well as the Consumer Price Index (CPI) for the same period. The CPI, which I will discuss in detail shortly, attempts to measure a composite average of about 400 individual goods and services, and is often used to describe general price movements. It is readily apparent from Table I that between 1967 and April 1974, there were widely disparate movements in the prices of the goods selected. All consumer prices rose 44 percent. Dried beans rose 324.7 percent, flour 82.5 percent, and fuel oil and coal 106.5 percent. But bananas and panty hose fell in price, while whiskey rose modestly.

Given these disparities, it is obvious that any attempt to summarize price movements for goods and services generally must involve some weighting scheme that assigns a relative value to the many goods and services that exist. In the CPI weights are assigned to about 400 individual goods and services based on the relative importance of each in the budgets of urban workers. The existing weights were derived from detailed budget studies based on expendi-

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tures in 1963. In brief, the weight of an individual price in the CPI that stood at 144.0 in April 1974 depended on the relative importance of that item in the expenditures of urban workers in 1963.

It is apparent that some method of weighting individual prices is necessary to create a price index that describes many prices. But equally apparent is the fact that any weighting scheme poses problems of accuracy for the overall index. We know from basic principles of economics that when prices of some goods and services rise rapidly relative to other goods and services, consumers substitute away from those rising most rapidly to those increasing less rapidly. Weights based on relative expenditures in past years do not recognize this substitution. Casual observation suggests that rising prices of men's haircuts have less impact on the typical family budget today than similar increases would have had in 1963, given the change in hairstyles. Indeed, an economist might argue that the rising prices and reduced consumption represent cause and effect.

At the same time, new products have been introduced since 1963 that replace old products. In the main, these substitutions do not show up in the CPI. And finally, quality change is not reflected in the CPI.

In essence, the CPI can be said to measure price changes for a fixed set of consumer goods and services that represented consumption patterns at some point in the past. It measures changes in the cost of present consumption if and only if consumers continue to allocate their budgets in the same way. We know from basic economics and from our own experiences that this assumption does not hold.

In addition to national figures, the Bureau of Labor Statistics also publishes CPI data for larger cities in the United States. Table 2 shows indices for several cities in April 1974. While the index for the country as a whole stood at 144.0 in April 1974, meaning that prices rose by 44 percent since 1967, the comparable figures for the three selected cities ranged from 135.8 to 150.9. It must be borne in mind that these figures say nothing about relative living costs in the three cities. Rather, the indices describe only how prices of a set of consumer goods have changed since 1967.

Data do exist that shed some light on relative living costs, however. The Bureau of Labor Statistics publishes figures that show the costs of purchasing specified amounts of goods and services in various cities in the United States. Three alternative budget levels are assumed in the data — higher, intermediate, and lower. In 1972 the respective costs of these budgets nationwide were $16,558, $11,446, and $7,386. These budgets are not fixed-weight statistics. Amounts of the various goods and services are allowed to vary over geographic regions, such that clothing purchases made by persons in Atlanta are not assumed to be identical with clothing purchases made by a family in Boston. Table 3 shows relative costs of the Intermediate Budget in the fall of 1972.

We see in Table 3 substantial geographic variation in the cost of the Intermediate Budget. If wage levels in those cities were adjusted for the costs shown in Table 3, the resulting variation in adjusted wages would be less than the variation in unadjusted wage levels.

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In closing this discussion, I would like to point out in brief that wages and prices historically have changed at different rates among occupations. Over long spans of time in the United States, incomes have tended to rise more rapidly than prices. Real purchasing power of wages has thus tended to rise over the long run, and this point tends to hold with virtually any measure of income or general wage levels.

For particular occupations, however, the relationship between earnings changes and price changes are quite disparate. From the late 1960's to the early 1970's earnings of engineers rose at a lesser rate than prices, while earnings for accountants rose much more rapidly. Starting salaries for new Ph.D.'s in many areas of the social sciences and humanities have remained almost unchanged over the past 3—4 years, despite upward movements in prices. These facts reflect basic economic forces of supply and demand in labor markets, and serve to remind us that earnings or wages in all occupations do not simply grow at similar rates.

TABLE I

Price Indices for April 1974,
on a 1967 Base

All Consumer Prices	144.0
Flour	182.5
Butter	116.4
Bananas	90.3
Dried Beans	424.7
Vacuum Cleaners	104.5
Fuel Oil & Coal	206.5
Hose or Panty Hose	92.5
Whiskey	109.8
Beer	121.6

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TABLE 2

Consumer Price Index,
Selected Cities, April 1974

United States	144.0
Chicago	143.0
New York — New Jersey	150.9
Seattle	135.8

TABLE 3

Relative Costs of
Intermediate Budget,
Fall 1972

Urban United States	100
Metropolitan Areas	102
Nonmetropolitan Areas	89
Boston	119
Lancaster	98
Portland, Maine	100
Dayton	93
Austin	86
Honolulu	119

THE CONSUMER PRICE INDEX, ITS STRENGTHS AND WEAKNESSES

Dr. Loren M. Solnick

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INTRODUCTION

The current state of the economy, especially the high rate of inflation, adds considerable strain to the problem of negotiating wage increases. Inflation affects wage negotiations in several ways. First, unanticipated price increases reduce the real purchasing power of income. Employees will be anxious to obtain catch-up wage increases to restore the former level of their purchasing power. Moreover, a sustained inflation such as we have experienced over the past few years creates expectations of future price rises. Thus employees will also wish to secure additional wage increases as a hedge against continuing inflation. This hedge often takes the form of demands for cost-of-living escalators where such provisions do not exist.[1] Public sector employees such as school boards are hurt by inflation in other ways as well. Nonwage costs tend to rise rapidly but such increases cannot be offset by increases in the price of the services provided. School boards must rely primarily on property tax revenues which tend to rise more slowly than prices. Inflation thus poses a greater problem for wage negotiations in the public sector than in the private sector.

Inflation, as reflected by advances in the Consumer Price Index (CPI), brings automatic wage increases to employees whose contracts contain escalator provisions. The employers of these persons may find payroll costs increasing more rapidly than anticipated. In addition, the escalated wages become the basis for negotiating future wages when the contract expires. Escalators therefore have a cumulative effect on wages that is larger than their direct effect.

The balance of this paper is divided into four parts. First, the current state of the economy is surveyed with particular emphasis on the factors which affect collective bargaining. Second, the composition and construction of the Consumer Price Index are described. Next, the characteristics and functioning of cost-of-living escalator provisions are detailed. Last, we discuss the specific factors which will bear most heavily on wage negotiations with teachers' unions. These factors include inflation, unemployment, the decline in enrollments, and the surplus of teachers.

THE ECONOMIC CLIMATE

The economic situation as this paper is written (October, 1974) is characterized by a high rate of inflation and substantial unemployment. The overall unemployment rate rose to 5.8 percent in September compared with 5.4 percent in August and 4.7 percent in October, 1973. The growth of production (GNP) has been brought to a virtual standstill. Despite the sluggish economy, inflation is continuing unabated at a record rate. The CPI in September was about 12 percent higher than a year ago. The price increase from August to September was also about 12 percent on an annual basis. The combination of no growth and high inflation has led some economists to describe the current state of the economy as "stagflation".

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An indication of how unions may respond at the bargaining table to this economic climate can be obtained by looking at recent collective bargaining settlements in the private sector. Wage increases in major agreements settled in the first half of 1974 in the private sector averaged 8.7 percent for the first year of the contracts and 5.8 percent over their life. The comparable figures for the first half of 1973 are 7.0 percent and 5.1 percent. The increase from 1973 to 1974 reflects the rising rate of inflation since the latter part of 1973. These figures suggest that unions will continue to press for high wage increases to mitigate the effect of inflation on the standard of living of their members.

Forecasting future economic conditions is always risky, especially with uncertain events like the Arab oil embargo to be considered. However, the Administration's stand on monetary and fiscal restraint suggests that the economy will not recover quickly from its stagnation. On the other hand, the sluggish economy should precipitate a decline in the inflation rate in 1975. Shortages of critical commodities and resources have been eliminated by the slowdown in business activity. However, food prices may continue to rise as a result of the drought in the corn belt this past summer. It is plausible to expect prices to rise by 8 to 10 percent in 1975 while unemployment will remain close to 6 percent.

THE CONSUMER PRICE INDEX

The CPI is universally used in cost-of-living escalators as an indicator of price level increases. Since the composition and construction of the various government price indices vary considerably, it is worth some effort to understand the CPI and why it is used in escalator formulas. The CPI is an index of the average price level of a fixed "basket" of goods and services. The basket includes hundreds of items whose prices are sampled monthly in cities across the country. The relative importance of each item in the index represents the average annual expenditures of urban wage earner and clerical worker consumers. In other words, how these consumers actually allocate their expenditures to the various items determines how much weight each item carries in the index. Table I shows the weights, or percentage expenditures of the major groups of items. In 1972, for example, food comprised over 22 percent of the consumption expenditures of the urban workers. Therefore, a 10 percent increase in food prices would raise the CPI by 2.2 percent (10 percent or one-tenth of 22 percent).

A monthly CPI is published for many major metropolitan areas. The overall figure for the United States is an average of the prices in the various cities sampled. The basket of items is revised every ten years to reflect changes in the purchasing patterns of consumers. Despite the great care and effort devoted to obtaining accurate prices for the items, and the broad range of items included in the index, the CPI does have some shortcomings. We like to think that progress means better quality goods and services as well as more of them. As goods and services improve their prices should be lower in terms of satisfaction received. The CPI can only be partially adjusted for these improvements and, therefore, tends to overstate the true rate of price increase. Another problem is that the market basket purchased by the typical urban worker differs substantially from the spending pattern of poorer families, suburban families, single individuals, etc. The Bureau of Labor Statistics is aware of this deficiency and is

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preparing to make revisions in the basket of goods to reflect the purchasing patterns of a broader group of consumers.

The shortcomings of the CPI do not seriously reduce the accuracy with which it reflects changes in the retail prices of the goods and services purchased by consumers. Moreover, it represents those prices more accurately than other government price indices. Other indexes of prices are less broad based (fewer items sampled) and thus reflect changes in price levels less accurately. For example, the Wholesale Price Index (WPI) measures changes in the prices of commodities at the wholesale level. It does tend to indicate changes in consumer prices since changes in the wholesale prices of items generally are passed on to consumers. However, consumer prices do not necessarily increase at the same rate as wholesale prices. More important, the WPI covers only commodities (omitting all services e.g., housing, transportation, medical care, etc.) and is therefore too narrowly defined for popular use. Despite some flaws the CPI remains the best indicator of changes in consumer prices.

The CPI is constructed to have a value of 100 in its base year, 1967. The index now stands at about 150, indicating a 50 percent rise in prices over the 1967 level. The 50 percent rise in prices reduces the real value of each dollar (real in terms of the goods and services that can be purchased with the dollar) by one-third or 33 percent. One dollar today can only purchase the equivalent of 67 cents worth of goods bought in 1967. Government statistics sometimes refer to real earnings or income. These figures are obtained by deflating (i.e., dividing) current earnings or income by the CPI. For example, a salary of $200 per week (after taxes) today is the equivalent of $133 in real (1967) dollars. Thus, if the CPI rises more rapidly than income, real income will fall.

COST-OF-LIVING ESCALATORS

Cost-of-living adjustments (escalators) are wage increases that depend on increases in the CPI. In the manufacturing sector, where escalators are most common, the formula used most often raises hourly wages by one cent for each 0.3 point increase in the CPI. This corresponds to about a 1 percent wage hike for each 1 percent rise in the CPI.[2] The formula used for salaried personnel usually relates increases in the CPI to percentage increases in salary. The formula need not yield a 1 percent salary increase for each 1 percent rise in the CPI although this rate maintains a constant level of real earnings. The escalator clause stipulates the period over which changes in the CPI are to be measured and the point at which the wage increases are to begin.

Escalator clauses may stipulate minimum or maximum increases, or both. Minimum increases are guaranteed and therefore do not depend on changes in the CPI. Thus, they are not truly escalator increases, but rather ordinary deferred increases. Maximums or caps limit the rise in wages that employees can receive from the escalator. The recent high rate of inflation has motivated unions to eliminate caps from escalator provisions whenever possible. It is also possible to stipulate that the escalator formula ignore initial CPI increases up to a specified level (e.g., the formula is effective for price increases above 5 percent in the relevant period). This qualification reduces the size of escalated wage increases, perhaps as an offset to normally scheduled wage advances.

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The frequency of reviews of the CPI and corresponding wage increases varies considerably. About 75 percent of escalator contracts in the private sector have quarterly reviews. Most of the other escalators have annual reviews. It should be noted that the more frequent the reviews, the larger the total wage payments received by employees over the life of the contract, even if the reference period and the escalator formula are the same. The employees receiving more frequent reviews will have more pay periods at the higher rate of pay than employees with less frequent reviews. The wage rate or salary at the end of the contract will be the same in either case, however.

During inflationary periods, escalators are effective in increasing the wages of employees covered by them more rapidly than the wages of noncovered employees. In the 1971 to 1973 period, for example, workers covered by escalators averaged about 2 percent greater wage gains per year than comparable workers not covered by escalators.[3] Escalators can be costly to employers during periods of rapidly increasing prices.

WAGE NEGOTIATIONS IN THE CURRENT ECONOMIC CLIMATE

Wage negotiations may be especially difficult in a period of high inflation and high unemployment. Inflation reduces the real income of employees making them anxious to secure large wage advances. School boards are faced with rising costs of educational materials, gasoline, heating oil, etc. Moreover, in a period where most persons' real incomes are declining and many are out of work, it will be difficult to raise additional tax revenues to meet a larger school budget. In view of the importance of wage negotiations, careful preparation is vital. The following short list of some important data is intended to be suggestive, and is by no means exhaustive: cost-of-living changes for the United States and the New York and Buffalo metropolitan areas; salary data for teachers in other communities in the State; estimates of cost increases for the non-salary items in the budget (10 - 15% is plausible); the local unemployment situation; recent property tax increases; current and future staffing needs; staffing flexibility (how many teachers are untenured?). These data provide a basis for informed negotiations.

At the bargaining table, wage increases are usually supported by one or more arguments. If real incomes have been reduced by inflation, union negotiators will argue for compensating increases plus a hedge against continued inflation. Maintenance of equity with teachers (or with other public employees) in other communities is also a frequently used argument. Great caution should be used in comparing salaries across communities. There are systematic differences in wage levels among large and small cities, suburban and rural communities. These variations reflect differences in the cost of living and in the pleasantness of living and working conditions. Teachers in New York City, to take an extreme example, face very different teaching circumstances in the classroom than teachers in small upstate communities. Living conditions and costs also differ considerably. It is therefore not logical to accept salary comparisons between communities that differ in size, location, composition of student body, etc.

Staffing needs and flexibility are important for several reasons. Enrollments will be declining in the future.[4] Staffing needs will be declining as well and this reduced demand for teachers is coupled with a surplus of

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qualified teachers. Therefore, teacher salaries need not keep pace with the pay of other employees in order to attract and retain a satisfactory teaching staff. This view, while perhaps appearing harsh, is the essence of the functioning of our labor market. In the 1960's there was a rapid expansion of school facilities to educate the children produced by the postwar "baby boom". There was a shortage of teachers during that period and teacher salaries rose rapidly in comparison to other groups. The higher salaries served to attract additional individuals to the teaching profession — to fill the demand for teachers. Now that there are many thousands of unemployed teachers, the labor market must function so as to attract them to other professions. Since there will be few new openings in teaching in the future, the fall of teacher salaries relative to other groups will help to encourage the reallocation of persons to occupations where their abilities can be utilized. In short, the forces of supply and demand suggest that small salary increases will not impair a school board's ability to meet its staffing needs.

A second factor to be considered is the adjustment of work loads. If work loads are increased (larger class size), then fewer teachers are needed and the school can afford (and justify) higher salaries. In general this will be opposed by teachers' unions. Moreover, it may be the case that the quality of the education declines if class sizes are too large.

The local unemployment situation and recent property tax increases bear on the school board's ability to raise additional revenues to pay higher teacher salaries. Inflation affects most communities similarly. However, the unemployment rate and tax burden may differ substantially from one community to another. These factors may be used to justify small salary increases. Teachers are unlikely to be sympathetic to claims of "inability to pay", however. Their attitudes will be toughened by their own economic hardships.

Well prepared negotiators will be better able to cope with the difficult task of compromising between the needs of the teachers and the needs and financial limitations of the school boards. I take some solace in the knowledge that I do not have to confront teachers with some of the arguments outlined above.

NOTES

1 In 1958 over 42 percent of workers under major collective bargaining agreements were covered by escalators. Following a period of relatively stable prices, coverage declined to less that 20 percent by 1964. Coverage rose to over 40 percent by 1974. See J. Staller and L. M. Solnick, "Effect of Escalators on Wages in Major Contracts Expiring in 1974", Monthly Labor Review, July, 1974, page 27.

2. Note that 1 point is not the same as 1 percent. A 1 percent increase with the CPI at about 150 is 1.5 points.

3. Staller and Solnick, page 31.

4. Public school enrollments in New York in September 1974 were about 50,000 less than in 1973.

TABLE 1

RELATIVE IMPORTANCE OF MAJOR GROUPS OF ITEMS

ON THE CONSUMER PRICE INDEX

GROUP	Relative Importance
All Items	100.0%
Food	22.5
Housing	33.9
Apparel and Upkeep	10.4
Health and Recreation	19.8
Transportation	13.1

Source: Bureau of Labor Statistics, "Relative Importance of Components on the Consumer Price Index", 1972

CURRENT COURT DECISIONS, PERB
DECISIONS, COMMISSIONER'S DECISIONS

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Raymond G. Kuntz

Since it first enunciated the rule in the Triborough Bridge case that increments must be paid in school district contracts, even though the contract by its term has expired, PERB has reaffirmed that decision a number of times. In Massapequa Union Free School District vs. CSEA, 7-3025 (Volume 7, Page 3034) PERB Reports, PERB has also extended that rule to terms and conditions of employment not covered by the agreement in a case known as North Babylon Union Free School District vs. North Babylon Teachers Association, (7-3027) Volume 7, Page 3040 PERB Reports. The North Babylon case is significant because it states several important PERB rules, (1) that the impact of abolition of positions must be negotiated; and (2) that "absent an explicit waiver, an employer may not alter a term and condition of employment which is not covered by the agreement" (emphasis added).

However, the courts and PERB itself have made some significant inroads into the Triborough doctrine. The Appellate Division, Second Department, has affirmed a holding of the Putchess County Supreme Court that teachers are not entitled to arbitrate grievances which arise after the contract has expired, even though the expired contract contained a grievance procedure terminating in final and binding arbitration. Board of Education of City School District of City of Poughkeepsie vs. Poughkeepsie Public School Teachers Association, 44 AD 2d 598. A hearing officer for PERB had held that where administrative salaries were computed as a ratio of teachers' salaries, and both the administrators' and teachers' agreements had expired, the administrators were not entitled to an increase when the teachers won a subsequent contract increase. The hearing officer said that the preservation of the status quo did not mandate an increase for the administrators. Matter of Wappingers Central School District and Wappingers Administrators Association, Paragraph 7-4524 (Volume 7, Page 4573) PERB Reports.

The Appellate Division, Fourth Department, has further modified the impact of the Triborough decision in a case known as Jefferson County Board of Supervisors vs. New York State Public Employment Relations Board, 44 AD 2d 893 (Fourth Department) May 23, 1974. The Jefferson County Board of Supervisors failed to pay an increment in a contract which said "all increments to be based on merit as determined by the administration and Board of Trustees" but which had as a common practice of ten years' standing a grant of increments to all faculty members who were retained in the Community College. The faculty members brought an improper practice proceeding before PERB. PERB found that the Board of Supervisors' failure to pay the increment was not an interference with the employees' contract rights under Section 209(a) but was a refusal to negotiate in good faith under Section 209(d) and ordered the Board of Supervisors to pay the increment, but the Appellate Division said that PERB had no power, insofar as its decision intimated, to compel the payment of the increment, and that PERB's remedy was solely to order the parties to bargain in good faith.

Undoubtedly the last chapter on whether PERB has the power, as it asserted in the Triborough case, to order municipal employers to pay increments in expired contracts, will be written by the Court of Appeals.

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In another area of the law, scope of bargaining, the Court of Appeals has written a final chapter on whether the subject of class size is a mandatory item of negotiations. In Matter of West Irondequoit Teachers Association vs. Helsby, 35 NY 2d 46, Judge Gabrielli, speaking for a unanimous Court, quoted the original West Irondequoit decision by PERB to the effect that "basic policy decisions as to the implementation of omission of an agency of government are not mandatory subjects of negotiations". The Court of Appeals said "the decision whether, say, sections of the fourth grade should contain 25, 28, or 30 pupils is a policy decision and not negotiable; whereas whether the teacher responsible for the sections are to receive varying consideration and benefits depending on the ultimate size of each section as so determined is mandatorily negotiable as a condition of employment". The Court distinguished a prior Appellate Division case (City School District, Oswego vs. Helsby, 42 AD 2d 262), which held that the length of a working year, found by PERB to be a condition of employment, was a correct decision, by stating that the length of the work year directly affected only the employer and employee relationship, whereas class size "is a basic element of educational policy, varying on the extent and quality of the service rendered".

The Court of Appeals also distinguished West Irondequoit from its prior decision in a case which is popularly known as Huntington 1, to distinguish it from Huntington 2, which dealt with the effect of the sabbatical leave moratorium for the 1971-1972 school year (30 NY 2d 122). The Court held that the "dispute [in Huntington 1] centered about whether the employer was limited under the Education Law as to the terms and conditions of employment it could negotiate, or whether the Taylor Law made the employer's power unqualified so that it could freely negotiate such terms and conditions without regard to an express authority under the Education Law. The question in the instant case is less complex, being whether, in the first instance, the problem area involves a term or condition of employment at all. We agree that PERB articulated a rational basis for its determination in the employer's favor and that it had the power to make this determination." The Court of Appeals in effect has said that the phrase "terms and conditions of employment" is a term of limitation and that class size is one of the areas outside of the meaning of the phrase.

In a recent decision, PERB has further limited what employers are compelled to bargain about under the phrase "terms and conditions of employment". In Yorktown Central School District vs. Yorktown Faculty Association, Paragraph 7-3030 (Volume 7, Page 3031) PERB Reports, the full PERB Board found that the following were not within the scope of mandatory negotiations: (1) the employer's decision to eliminate jobs; (2) demands for a greater role in the making of decisions relating to the development of curriculum, evaluation of principals, the assignment of paraprofessionals, and other educational matters; (3) demands for a greater role in the formulation of policy related to student guidance in high school; (4) demands that each student shall have a specific number of contact periods in various subject areas with teaching specialists; and (5) demands concerning the salary and job assignments of per diem substitutes who are not in the negotiating unit. However, PERB found that the association's demand that there should be a maximum limit on 22,000 weighted student contact minutes (WSCM) per week, which is calculated by a formula that included, among other factors, class size, was negotiable. The WSCM was to be calculated by multiplying five factors: (1) contact periods per day per teacher; (2) length of contact period; (3) number of students per contact period (class size);

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(4) number of contact periods per week; (5) weighting factor. The weighting factor was a formula assigning different values to different classes. For example, mathematics, English and social studies in grades 6—12 had a weighting factor of 1; library, science in grades 9—12 had a factor of 1.04; industrial arts in grades 7—12, 1.67; home economics in grades 7—12, 2.0; learning disability in grades k—5, 2.67; instrumental music in grades 6—12, 5.0. The PERB Board said that the formula not only included class size but hours of work and number of teaching periods which it had previously ruled as subject to mandatory negotiations in the Matter of West Irondequoit Board of Education (4 PERB 3725). In other words, impact of class size is negotiable, but not class size itself.

When the PERB Board decision in the Yorktown case is compared with the Court of Appeals' decision in the West Irondequoit matter, it is quite clear that many areas of intense interest to teacher associations are not within the area of mandatory bargaining under the Taylor Law, and that school districts may, if they wish, refuse to bargain about items such as class size, the decision to eliminate jobs, curriculum decisions, evaluation of principals, assignment of paraprofessionals, formulation of guidance policy, amount of student contact with teaching specialists, salary and job assignments of per diem substitutes, and be sustained by the courts and by PERB.

In the past several years, the law governing the separation of teaching employees from school districts has undergone remarkable change, whether that separation occurs as the result of the expiration of a probationary term, dismissal during the probationary period, dismissal on charges after tenure had been acquired, separation due to the elimination of a position, or on other grounds or for other reasons.

Before undertaking an analysis of the recent case law in regard to separation from employment, a brief recitation of the rules in regard to the acquisition of status as an employee is in order.

Before any teacher can be appointed to a probationary appointment, two things must happen: (1) the teacher must be recommended to the board of education by the superintendent of schools, or if the school district does not employ a superintendent of schools, the district superintendent of schools; and (2) there must be an affirmative vote by the majority of the board of education. Just as the superintendent of schools or district superintendent has no power, acting alone, to confer probationary status, neither does the board of education, acting alone, have such a power. Without the affirmative recommendation of the superintendent of schools or district superintendent, the majority of the board of education has no power to confer probationary status. (See Matter of Waterman, Opinion No. 8714, 13 Ed. Dept. Rep. P.68.) Some types of teaching service do not constitute service as a probationary teacher and confer no probationary status upon the teaching employee. Section 80.36 of the Commissioner's Regulations defines a substitute teacher as one who is employed in place of a regularly appointed teacher who is absent but is expected to return, and requires that substitutes serving on a long term basis shall have proper certification for the position.

Substitutes, under the Commissioner's Regulations, fall into three general categories: (1) substitutes with valid teaching certificates who may be employed

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in any capacity for any number of days, but if other than on an itinerant basis, then in the area for which they are certified; (2) substitutes without a valid certificate, but who are completing study toward certification at the rate of six credits per year and who may be employed on the same basis as the first category of substitutes; (3) substitutes without a valid certificate who are not working toward certification and who may be employed for no more than 40 days per year per school district. In Matter of Sanderholm, Decision No. 8612, 12 Ed.Dept.Rep. 207, the Commissioner of Education has ruled that service as a substitute teacher does not confer probationary status on an employee. This rule should not be confused with the so-called "Jarema Law" found at Sections 2509 and 2573 of the Education Law, which provide that when a full-time substitute teacher is later appointed to a probationary period, immediately following upon service as a substitute on a full-time basis and in the same tenure area, the service as a substitute counts in the calculation of the length of the probationary period for up to two years.

It is not necessary for school districts who employ substitutes for extended periods of time to appoint such substitutes to a probationary period, as is the practice in some districts, since the conferral of such status upon the employee mandates separation from employment only on the basis of the rules set out in the Education Law. The substitute teachers' rights in regard to length of employment, compensation, and benefits, can be the subject of a separate arrangement between the teacher and the school district, or an arrangement made pursuant to the collective bargaining agreement with the teachers' association, but these rights and benefits should not be confused with the attainment of probationary status, which results from the operation of law.

In the Matter of Parker, Decision No. 8548, 12 Ed.Dept.Rep. 97, the Commissioner has held that employment as a part-time teacher does not act to confer probationary status. Part-time teachers should not be employed on a probationary basis by school districts, and their rights and benefits of employment should either be determined by agreement between the district and the individual teacher or as part of a collective bargaining agreement. In the case of Sura vs. Berlin Central School District, Decision No. 8538, 12 Ed.Dept.Rep. 81, the Commissioner held that a teacher who fails to achieve tenure and is thereafter continued on a part-time basis in the same job, has not acquired tenure by virtue of the part-time service. It is consequently clear from the Commissioner's decisions that part-time service does not act to create a probationary period or to create tenure by estoppel. However, caution has to be exercised in applying this rule to kindergarten teachers, since the possibility exists that their service can be considered full-time even though the teaching session is only two and one half hours in duration.

Although not directly in point on the subject of probationary status, the case of Weinbrown vs. Board of Education, 28 NY 2d 474, decided by the Court of Appeals in 1971, shortly before the change to the mandatory five-year period, still seems to be the law. It holds that a board of education, acting upon the recommendation of the superintendent, can confer tenure status upon a probationary employee prior to the expiration of the probationary period.

After consideration of those general principles in regard to the acquisition of status as either a probationary or a tenured employee, we are now ready to consider the question of separation from employment. By far the most common

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method of separation from employment is by either resignation or retirement. The Commissioner of Education has held in several appeals that once a resignation has been submitted by a teacher, it cannot later be rescinded. (Matter of Lawner, Decision No. 8584, 12 Ed.Dept.Rep. 157; Matter of Kurtis, Decision No. 8583, 12 Ed.Dept.Rep. 156; Matter of Bowman, Decision No. 8668, 12 Ed. Dept.Rep. 306).

However, on January 15, 1974 the Westchester County Supreme Court, in the Matter of Schwartz vs. North Salem School Board, (not reported) ruled that where a collective bargaining agreement called for submission of a notice of intent to retire by the teacher a year prior to the retirement, and where acceptance of the retirement by the board of education occurred in September, the teacher nevertheless had a right to rescind the notice of "intention to retire" even though the teacher had accepted a substantial early retirement stipend. The court based its decision on the ground that the school district had not hired a replacement for the teacher prior to the time that he revoked his intent to retire. The case has recently been affirmed by the Appellate Division, Second Department, without opinion, with two Judges dissenting (45 AD 2d_____).

In recent cases, two teachers decided to challenge the superintendent's failure to give a recommendation before the courts. In Matter of Orange, New York Law Journal, February 25, 1974, page 17, the New York County Supreme Court held that such a challenge must occur within the four-month statute of limitations for Article 78 proceedings, and that the statute of limitations begins to run when the teacher's dismissal became effective, in that case, on June 30, 1973. In the case of Farrell vs. Carmel Central School District, also decided February 25, 1974, the Putnam County Supreme Court held that the four-month statute of limitations runs from the date that the superintendent notified the teacher that he was not making a recommendation pursuant to the 60-day provision of Section 3012 of the Education Law. However, the Appellate Division, Second Department, has recently ruled that when an administrative action is made on one date effective at a later date, the statute of limitations for Article 78 proceedings is measured from the later date.

When a teacher is dismissed during the probationary period or is not recommended for tenure at the conclusion of the probationary period, reasons do not have to be given to the teacher for the action unless the teacher requests the reasons in writing pursuant to Section 3031 of the Education Law. The Commissioner has held that Section 3031 does not apply to dismissals at the end of the probationary term (Matter of Waterman, Opinion No. 8714, 13 Ed.Dept.Rep.68). But when the reasons are given, they must be sufficiently specific to allow the teacher to respond to them in a meaningful way, and the Commissioner so held in Matter of McGrath, Decision No. 8699, 13 Ed.Dept. Rep. 50, September, 1973.

The requirement for specificity under the Fair Dismissal Law has further opened the question of constitutionally impermissible grounds for dismissal, whether during the probationary period, at its conclusion, or after tenure has been acquired. Even prior to the effective date of the Fair Dismissal Law, when the superintendent of schools had to give no reason for his recommendation to dismiss during the probationary term or failure to recommend at its conclusion, the courts have held that tenure may not be denied for

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the purpose of retaliating against a teacher for an exercise of a constitutional right. In the Matter of Tischler vs. Monroe Woodbury Central School District, 37 AD 2d 261, decided on July 23, 1971, the Appellate Division, Second Department, held that union activity was a constitutionally protected area, and that tenure could not be denied unless the district could demonstrate that it was not motivated by a desire to punish the Petitioner for union activities, and that its decision was based on not wanting her for a legitimate cognizable reason.

The language of the Tischler decision led to speculation that once a teacher had raised the issue of constitutionally impermissible grounds as the reason for dismissal during the probationary period or the denial of tenure, that the burden was cast upon the school district to prove the validity of its actions, and in a decision in June of 1973, the Appellate Division gave credence to this belief in a case known as Bergstein vs. Board of Education of Union Free School District No. 1 of the Town of Ossining, 42 AD 2d 591, reversed 34 NY 2d 318.

In the Bergstein case, the teacher claimed that the board of education had denied him tenure for exercise of his rights of free speech guaranteed under the First Amendment to the Constitution. The Appellate Division held that special term relied upon hearsay statements by the board members as to why they voted against tenure. The board members had told the trial court that they had voted against tenure based upon what they had heard about the teacher as well as what they knew directly. The Appellate Division said that special term had erred when it gave credence to the hearsay evidence of the school board members and ordered a new hearing to give the board of education an opportunity to produce legal and competent evidence to establish that tenure had not been denied for impermissible reasons.

The Court of Appeals reversed the Appellate Division and held that the teacher had the burden of establishing that the denial of tenure was for constitutionally impermissible reasons, not the board of education, and said that the board had properly relied upon hearsay evidence in forming its judgment about the decision to deny tenure. The Court of Appeals' decision is also quite significant because it firmly establishes the rule that a board of education does not have to grant a hearing under Section 3031 and does not have to disclose reasons for its decision.

However, the rule of the Commissioner in McGrath that the reasons for the dismissal, when requested, must be specific, has opened the possibility that when the reasons are given, they may be serious enough to convince a court that a full trial-type hearing is necessary. In July, 1974, the Second Circuit Court of Appeals, the federal appellate court for the New York area, held that when a teacher's probationary period was terminated by the New York City School District on a finding that the teacher was mentally ill, such a finding required a full scale trial-type hearing before the dismissal could become effective (Lombard vs. Board of Education of City of New York, NYLJ July 22, 1974, page 1, column 6). The New York City Board of Education did afford a hearing, but there was no sworn testimony and apparently no cross-examination. The Court's decision recites that there was no testimony relative to the teacher's unfitness to teach and that the principal of his school, who had initiated charges, did not testify. The Court said that the

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case came within the exceptions stated in Board of Regents vs. Roth (408 US 564, 1972) because the teacher was deprived of his reputation as a person who is presumably free from mental disorder. The Court said that the determination "is not only a finding, but a stigma. If it is unsupportable in fact, it does grievous harm to Appellant's chances for further employment, as indeed the Record demonstrates, and not only in the teaching field. For that reason, he was entitled to a full hearing."

The status of the law in regard to dismissal of employees during the probationary period consequently is such, in light of the Lombard decision, (supra) that if the reasons are revealed and they attach "a stigma" to the teacher's reputation, then a full scale hearing, or trial-type hearing, may be required.

The courts have also made it quite clear that not only must dismissals not run afoul of constitutional grounds, any dismissal must also be in accordance with the provisions of a collective bargaining agreement which have some ostensible relationship to the judgment process leading to the decision to dismiss. If the collective bargaining agreement has a grievance procedure which terminates in final and binding arbitration and the teacher who has been dismissed initiates a grievance alleging contract violations, the courts have ruled that the arbitrator has the power to fashion a remedy, including returning the teacher to the district for an additional year of probationary service to be evaluated in conformity with the terms of the collective bargaining agreement.

The foregoing principle has been upheld by the Appellate Division, Fourth Department in the case of Board of Education vs. Grand Island Teachers Association, 67 Misc. 2d 859, 324 NYS 2d 717, affd. 39 App. Div. 2d 66, 326 NYS 2d 1023. The same reasoning has been adhered to by the Appellate Division, Third Department in the recent case of Matter of the Arbitration between Central School District No. 2 (Livingston Manor Central School District) vs. Livingston Manor Teachers Association, 44 App. Div. 2d 876, May 23, 1974).

In the Livingston Manor case, the teacher had been appointed to a probationary period of three years on September 1, 1969. Effective May 9, 1971, the probationary period was extended to five years, and a year later the Legislature passed Chapter 953 of the Laws of 1972 restoring the three-year period to those appointed prior to May 9, 1971, giving school districts until July 31, 1972 to act on teachers who would have acquired tenure by virtue of the expiration of the three-year probationary period. The district superintendent of schools failed to recommend tenure, and the board of education also voted to deny her tenure.

The teacher filed a grievance alleging that the collective bargaining agreement had been violated in that she had not been notified of her proposed termination by March 15 as specified in the contract, that she had been observed only twice instead of the contractual three times in the 1970-1971 school year, that the administration had failed to make constructive criticism of her performance, and that derogatory material had been placed in her file a year prior to her dismissal without affording her an opportunity to review the material. The grievance was denied by the administration and the board of education, and appealed to arbitration.

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A stay action was brought in the Ulster County Supreme Court by the district on the ground that the teachers' association had asked the arbitrator to award tenure to the teacher. The Ulster County Supreme Court held that the arbitrator had no such right and granted a stay. In the appeal to the Appellate Division, the teachers' association said that it concurred with the ruling of the Court that the arbitrator had no power to grant tenure, but that the Court should have allowed arbitration of the alleged contract violations to see what remedy the arbitrator would propose. The Appellate Division agreed with the teacher's contention and directed arbitration.

In the Grand Island case, the arbitrator ultimately fashioned a remedy which compelled the school district to take the teachers back for a year and reevaluate them or pay a year's salary to each of the six teachers who had been dismissed. In its opinion in the Livingston Manor case, the Appellate Division approved a similar result in a Fourth Department case, known as Board of Education of Chautauqua Central School District vs. Chautauqua Central School District Teachers Association, 41 AD 2d 47, and said that it contemplated that the arbitrator could have the power to reinstate the teacher for an additional probationary period.

The courts have not yet directly grappled with the question of whether reinstatement by an arbitrator would constitute tenure by estoppel, but it is fairly obvious from the Commissioner's decisions and the court decisions that such a result would not occur. The Commissioner's decisions reveal that tenure by estoppel occurs by virtue of administrative or board mistake or misjudgment as to the computation of the probationary period. It is quite likely that if the case of an arbitrator's reinstatement is ever presented to the courts or the Commissioner, the teacher will be held to have waived any right to claim tenure by estoppel by invoking the grievance and arbitration machinery. (Matter of Moscowitz, Commissioner's Decision No. 8670, 12 Ed.Dept.Rep. 309, the Commissioner reaffirmed the rule of Matter of Downey, 72 St.Dept.Reps.29.)

The 60-day notice provisions in Sections 3012, 3013, and 2509 have been held not to apply where the board of education turns down a recommendation of the superintendent for tenure (Matter of Sanderholm, Decision No. 8612, 12 Ed.Dept.Rep. 207). It has been the longstanding rule of the Commissioner of Education that failure of the superintendent to give the 60-day notice of his decision not to recommend for tenure is a mere procedural defect, and cannot act to grant a teacher tenure by estoppel.

Just as it is possible for teachers to acquire tenure by estoppel without any formal action of the superintendent and the board of education, it is also possible for separation to occur without a formal resignation by a teacher or without action by the superintendent and board of education, when the teacher abandons the position. In Matter of Johnson, Decision No. 7356, 3 Ed.Dept. Rep. 186, the Commissioner held that a teacher who had taught only a few days each year in four prior school years because of illness was entitled to her position, despite the board of education's refusal to let her work, because she could not be held to have voluntarily and deliberately abandoned her position.

However, the more recent case, Matter of Fink vs. Union Free School District No. 21 of Oyster Bay, 11 Ed.Dept.Rep. 67, the Commissioner of Education found an abandonment of employment upon the following facts. The teacher in

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question asked for and received a maternity leave from January 17, 1969 through June 30, 1970. On May 29, 1970 the teacher applied for an extension of maternity leave and was denied. The teacher then sent a letter to the school district saying that she did not intend to return for the 1970-1971 school year. The district wrote back to her and said that her letter saying that she would not be present would be treated as a resignation unless it was withdrawn. She in turn sent a letter saying that she was not returning, but that she was also not resigning. The board of education held her position vacated and abandoned and was sustained by the Commissioner of Education.

The Commissioner distinguished his ruling in Fink from his prior ruling in Johnson by saying that a voluntary and deliberate act had occurred in Fink which had not occurred in Johnson. The Fink rule seems much the better decision, and can probably best be distinguished on the ground that the school district established its case in Fink with the correspondence. The Johnson case recites no history of any correspondence or communications between the school district and the teacher in regard to the teacher's status. A similar result to Fink has recently been reached in Matter of Schiliro, Decision No. 8769, 13 Ed.Dept.Rep. 163, where the teacher took a job in another district after the Commissioner held his position in the district had been improperly abolished.

Separation from employment also occurs through an elimination of position. When a position is eliminated, the Commissioner has consistently held that the rules set forth in Section 2510 of the Education Law apply to the question of which teachers must be released. Although Section 2510 is found in that section of the Education Law which applies only to city school districts, the rules set forth in Section 2510 have been held by the Commissioner to apply to every school district, and the rule is that the teacher with the least seniority in the tenure area of the position eliminated must be released first. In this regard, there is no distinction between probationary and tenured teachers, since the concept of tenure area controls (the capacity in which the teacher serves) and not whether that teacher is probationary or tenured.

The courts have not disagreed with the rules of Section 2510, but they have sharply disagreed with the Commissioner on the question of what constitutes a tenure area. Two leading cases in this area are Lynch vs. Nyquist, 41 App. Div. 2d 363, affd. 34 NY 2d 588, and Baer vs. Nyquist, 40 App. Div. 2d 925 affd. 34 NY 2d 291. In the Lynch case, the teacher was given a tenure appointment in the area of English, Social Studies, and Latin, but was not certified to teach in English and Social Studies, although at the time of her tenure appointment, the case recites that she was teaching five classes a day in English and Social Studies. At the end of the school year in which she obtained tenure, Latin was eliminated from the school curriculum, and the teacher notified that her services would no longer be required since her Latin teaching position had been abolished. She was told that her English classes were assigned to a teacher provisionally certified in that subject, but junior to her in seniority. She appealed to the Commissioner of Education who sustained the board's dismissal on the ground that the district could not employ an uncertified teacher and that Section 2510 would not protect an uncertified teacher (see Matter of Lynch, Decision No. 8677, 11 Ed.Dept.Rep. 107).

In reversing the Commissioner, the Court said that certification require-

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ments may not be employed to erode the protections afforded tenured teachers, and said that if the board wished to avoid violation of the provisions of the Education Law which proscribe the employment of unqualified teachers, Sections 3009 and 3010, then it should move to discontinue the teacher's services for legal incompetence due to a lack of certification by following the procedures outlined in Section 3020-a.

In the Baer case, Thomas Baer was employed to teach General Science at the junior high school level on September 1, 1967. He requested a change to Social Studies, and in September 1968 he began to teach in that area. In March 1971, he was notified that he was not being awarded tenure and that he would be dismissed effective June 30, 1971. Baer said that he had acquired tenure in the three-year period from September 1, 1967 to August 31, 1970, and that the board had no right to dismiss him. He appealed his dismissal to the Commissioner of Education who sustained the board on the ground that Baer had entered into a new tenure area when he switched from science to Social Studies.

The Commissioner of Education held that tenure areas were created by action at the local school district level and that the school district had established secondary social studies and secondary science as separate tenure areas. The Commissioner's decision was appealed to the courts, and reversed. In upholding the special term reversal and the Appellate Division sustaining the Supreme Court of Nassau County, the Court of Appeals, on June 6, 1974, held that tenure areas could not be created by local boards of education nor by the action of the Commissioner of Education confirming the actions of local boards, and that the concept of vertical tenure areas as outlined in the Commissioner's decision in Baer were not allowed under the law. The Court said that horizontal tenure, except for some specified special areas, was the law of the state of New York unless changed by the Legislature or the Board of Regents. The Court said, but did not definitively rule, that the tenure areas are: elementary, secondary, kindergarten, and certain specified subjects including physical education, music, art, and vocational subjects (Matter of Becker vs. Board of Education, 9 NY 2d 111; Matter of VanHeusen vs. Board of Education, 26 AD 2d 721).

From the standpoint of an elimination of position, the rules laid down in the Baer case pose enormous difficulties for school districts if it becomes necessary to eliminate positions. The Court has defined seven tenure areas: elementary, secondary, kindergarten, physical education, art, music, and vocational subjects. It has said very clearly that the creation of any other tenure areas will have to be the result of action by the Board of Regents or the Legislature. This means that if a school district eliminates a high school foreign language position, it will not be able to release the teacher occupying the position unless that teacher is the least senior person in the secondary area. If the secondary mathematics teacher is the least senior in such a situation, then that teacher must be released. It's basically a hopeless mess, but school districts are going to have to live with it until relief is afforded by the Board of Regents or the Legislature.

A district's decision to abolish positions has to be viewed from other aspects than those created by the question of which teacher is senior in a particular tenure area. As a general principle, school districts have the right to create and abolish positions, and this right is not negotiable and

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cannot be interfered with by the terms of the collective bargaining agreement. In Carmel Central School District vs. Carmel Teachers Association, 348 NYS 2d 667 (Supreme Court, Putnam County, 1973) the court said that good faith abolition or creation of positions are a managerial function within the discretion of the board of education, not related to terms and conditions of employment, and therefore not arbitrable. The Court said that while a school district had authority to negotiate an agreement with its teachers concerning terms and conditions of employment, it did not possess similar authority where the matter did not pertain to terms and conditions of employment.

The Public Employment Relations Board has held that the impact of abolition of positions is a negotiable item and can become the subject of a provision of a contract (North Babylon Union Free School District vs. North Babylon Teachers Association, Paragraph 7-3027, Volume 7, Page 3040, PERB Reports).

In the Matter of Geduldig vs. Board of Education of the City of New York, Community School District No. 9 et al., 43 AD 2d 840, 351 NYS 2d 167 (2d Dept. 1974) which concerned the question of whether a school district could dismiss all of its attendance officers (truant officers). The Court held that it could not, because such action would "effectively destroy" the attendance provisions of the Education Law (Sections 2570, 3205, Subdivision 1, Paragraph A, 3209, 3210, 3212, 3213, and 3214). The Court added that if only some of the attendance teachers had been discharged, it would leave a question of sufficiency of enforcement personnel within the local district, subject to administrative review and later to judicial review if the decision was "arbitrary or unlawful".

In the Matter of Richard A. Schiliro, 13 Ed.Dept.Rep. 45, Decision No.8697, September 6, 1973, the Commissioner of Education decided that the board of education had exceeded its power by abolishing a full-time physical education position and creating two part-time positions to replace it, offering only one of the part-time positions to a tenured teacher who had held the full-time position prior to the change.

The Petitioner had served as a physical education teacher for both males and females. When his full-time position was abolished, he was offered the position of part time physical education instructor for the males in the school, the other position to be filled by a female instructor on a part-time basis.

The Commissioner directed the board of education to reestablish the Petitioner's position and reappoint him to tenure without reduction of his prior salary.

Support for the logic of the Geduldig case can be found in a recent decision of the Court of Appeals, Matter of Young vs. Board of Education, 35 NY 2d 31 (July 11, 1974) where the Court faced the issue of whether a school district could abolish the position of an attendance teacher and divide duties of the position among principals and assistant principals in the school district. The court said that it could and that the district's action was not an interference with the attendance teacher's tenure rights. The Court said that school districts "where appropriate, [had] the power to consolidate and abolish positions for economic reasons". In holding that there was no interference with tenure rights, the Court said "had a new or part time position been created to carry on the work formerly done by Petitioner, a different

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question would be presented", intimating that the attendance teacher would have a right to such new or part-time position. The Court did not have to reach the question presented in the Geduldig case, where all the attendance officers had been abolished because the Court said "while the position of attendance teacher has been abolished, the duties have been continued in the principals and assistant principals of the school district. Were the duties also abolished, a different question would be presented." The Court's language again intimates that had the position been abolished and the duties not distributed, it would have reached a result similar to that handed down by the Appellate Division, Second Department in the Geduldig matter.

It ill behooved the Court in the Lynch case to speak blithely about the utilization of Section 3020-a proceedings. Such proceedings must be utilized when the teacher has acquired tenure, and no tenured teacher can be separated from employment except pursuant to the rules of Section 3020-a of the Education Law. A tenured teacher can only be separated from employment for the following reasons: (a) insubordination, immoral character, or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification; or other reason which, when appealed to the Commissioner of Education, shall be hald by him sufficient cause for dismissal. If a tenured teacher is charged with such an offense, the board of education must meet in executive session to determine whether there is probable cause to hold a hearing to determine guilt or innocence of offenses charged. If the majority of the board votes probable cause, then the teacher is served with written notice of the charge and has three options. One option is to demand a public hearing before a three-member hearing panel, with one panel member appointed by the teacher, the second by the board of education, and the third by the other two panel members, or if they can't agree, by the Commissioner of Education; the Commissioner of Education also appoints a hearing officer to supervise the taking of testimony, and the school district must provide a transcript of the proceedings to the teacher.

As a second option, the teacher can elect to have a private hearing before a hearing panel constituted in the same manner as in the first option, or the teacher can waive the first two options and go directly to the board of education. If the teacher elects either of the hearing options, the hearing panel, after conducting the hearings, must forward a report and recommendations to the board of education. The board of education then makes its determination and imposes the penalty, which may be a reprimand, a fine, suspension without pay, or dismissal.

The law in regard to how Section 3020-a proceedings are conducted is not fully settled, and there have been a number of significant decisions this year, some as late as last week.

The first significant decision came late in 1973. That case is entitled Jerry vs. Board of Education, 4 Misc. 2d 461, reversed 44 AD 2d 198, and in that matter, the Onondaga County Supreme Court held that the provision of Section 3020-a which gave school districts a right to suspend a teacher with or without pay during the pendancy of a Section 3020-a hearing was valid. The next significant decision was Kinsella vs. Board of Education, United States District Court, Southern District of New York, 378 F 2d 54, February 19, 1974,

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in which a teacher challenged the constitutionality, under the Fourteenth Amendment to the United States Constitution, of Section 3020- proceedings. A three-judge federal court, relying upon a rather superficial reading of Board of Regents vs. Roth, 408 US 564, and Perry vs. Sinderman, 408 US 593, held that the portion of Section 3020-a which provided that the board of education could render its decision after receipt and review of the hearing panel's report and recommendation was unconstitutional because it did not provide that the board's decision be based upon the record of the hearing, or upon determinations of fact and explanations of reason. The Court went on to express its surprise at the holding in the Jerry case and clearly indicated that if the matter were brought before it, the ruling would be different.

The Commissioner of Education administratively moved to cure the supposed constitutional defects in Section 3020-a proceedings, and his regulations now provide that the board of education must base its decision upon the record established at the hearing and that the board must render its decision in a written report which makes findings of fact and sets forth reasons. The Jerry case was appealed to the Appellate Division, Fourth Department, and based in part upon the dicta in Kinsella, the Fourth Department, on April 11, 1974, reversed the lower court , and held that a teacher could not be suspended without pay during the pendancy of a Section 3020-a hearing except under the most extraordinary circumstances.

Prior to the ruling by the Appellate Division, Fourth Department, a teacher charged under a Section 3020-a proceeding who had been suspended without pay during the pendancy of the proceeding appealed to the Commissioner of Education, and the Commissioner, in a case entitled Matter of Wolfson, Decision No. 8806, April 10, 1974, held that he would not rule upon the constitutionality of Section 3020-a, and since it was very clearly stated that a teacher could be suspended without pay, he would not disturb the board's decision. The Appellate Division decision in Jerry then came down and Wolfson moved to reargue before the Commissioner. The motion for reargument is still pending, and was likely held in abeyance by the Commissioner because at that time Wolfson instituted an Article 78 proceeding before the Dutchess County Supreme Court to compel reinstatement of his salary. However, on April 16, 1974, the Supreme Court of the United States handed down a decision known as Arnett vs. Kennedy, 416 US 134, 40 L Ed 2d 15, 94 S Ct 1633, in which it construed the Federal Civil Service procedure relating to suspension and dismissal of federal employees, upon which Section 3020-a was based. The Supreme Court held that the federal procedure was constitutional and that employees could be suspended without pay during the pendancy of hearings. Based upon the Arnett case, the Dutchess County Supreme Court, in a decision dated July 11, 1974, held that the Fourth Department decision in Jerry was wrong when it said that a teacher could not be suspended without pay. On July 24, 1974, the Appellate Division, Second Department, in a case known as Goldin vs. Board of Education of Central School District No. 1 (Towns of Brookhaven and Smithtown), 45 AD 2d 870, basically agreed with the Dutchess County Supreme Court, and said that a balance of the equities required a suspension for no more than 30 days without pay. Any school district or any school district attorney engaged in a Section 3020-a proceeding should read the Arnett vs. Kennedy decision and the Goldin decision. There is a dissent by Judge Brennan in the Goldin case, and as a consequence, an appeal may be expected to the Court of Appeals. The Jerry case has been appealed to the Court of Appeals and a decision is expected shortly.

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The Goldin case is also interesting for another reason. In the case, the school district had charged the teacher, a guidance counsellor, with immoral conduct pursuant to Section 3020-a, for spending the night with an 18-year-old female member of the graduating class of 1973. One of the defenses argued by the teacher to the Court was that his out-of-school activity with the girl, who was over the age of consent, and who was no longer a student in the school district, was not a proper subject for review by the school authorities. The Court disagreed, and said "a professional teacher, entrusted with forming the moral and social values of our young people must accept the reality that he is held to a high or strict standard of conduct. At bar, there is a serious charge made, with serious implications. Approximately two months after having a particular student under his guidance, Plaintiff is accused of going to bed with her. Such conduct might be susceptible to the presumption that the intimate relationship did not develop overnight. The incident conceivably could so upset the community as to undermine the confidence of students and parents of students who now seek Plaintiff's guidance. This, in turn, could go to the heart of Plaintiff's ability to carry out his duties (see Yang vs. Special Charter School District No. 150, Peoria County, Illinois, App. 3 D. 239). In a concurring opinion, Judge Hopkins, quoting a federal court case, said "We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. 'Fitness for teaching depends upon a broad range of factors (Deilan vs. Board of Public Education School District of Philadelphia, 357 US 399, 406).' Subdivision 2 of Section 3012 of the Education Law states several of these factors. Even as a private employer may inquire into, and take action against, an employee who conducts himself in violation of the rules of his employment or the ordinary expectation of trust arising out of the employ ent without violating the employee's right of privacy (e.g. Earp vs. City of Detroit, 16 Mich. App. 271), so a Board of Education has like powers."

After a school district has gone through the agony of a Section 3020-a proceeding, it has often found difficulty, especially in the Appellate Division, Second Department, in sustaining any separation from employment which results from the process. But on May 15, 1974, the Court of Appeals handed down decisions in five cases in which it reversed the Appellate Division, Second Department in three cases, the Third Department in one case, and sustained the First Department in another case, and in each case upheld dismissals of employees by the employing municipality. The case is known as Matter of Pell vs. Board of Education, 34 NY 2d 222.

In the first case, Pell, the school district had dismissed a teacher whom it found guilty of falsifying sick leave three days a month for seven months to attend monthly meetings of the College Senate of which he was a member. The Appellate Division had reduced the dismissal to a suspension without pay. The Court of Appeals reversed. In the second case, Muldoon, a police officer got drunk and fired his revolver out of the Public Safety Building in Syracuse. The Police Chief fired him, and the Appellate Division, Fourth Department, modified the dismissal to a suspension. The Court of Appeals reversed and reinstated the dismissal. In the third case, Chilson, a construction inspector employed by the New York City Board of Education, plead guilty to taking bribes. He was dismissed by the board of education, but the special term in New York County reversed the board and ordered a suspension. The Appellate

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Division, First Department, reinstated the dismissal and was upheld by the Court of Appeals. In the fourth case, Best, an employee of the New York City Transit Authority, was found pilfering from a subway coinbox. He was dismissed by the Transit Authority, and the Appellate Division reduced his dismissal to a suspension without pay. The Court of Appeals reversed and reinstated the dismissal. In the fifth case, Abbott, a police officer, falsified sick leave and during the time he was supposedly sick, was actually working for a private firm. The Village of Mamaroneck dismissed him, and the Appellate Division reduced that to a suspension. The Court of Appeals reversed and reinstated the dismissal.

In sustaining the dismissal of the municipal employees, the Court of Appeals set down several important rules. It said that the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. It held the courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. It said that the courts should only set aside determinations as to penalty if the penalty is "so disproportionate to the offense, in light of all this evidence, as to be shocking to one's sense of fairness." The Court said "unless an irrationality appears or the punishment shocks one's conscience, sanctions imposed by administrative agencies should be upheld." The Court also said, that when an administrative abuse of discretion is determined to have occurred, it may be appropriate more often to remand the matter to the agency initially exercising the power unless other circumstances peculiar to a particular case make the record sufficient to permit the reviewing court to assess the permissable measure of punishment warranted. The Court said that the substantial evidence rule applies to situations where a hearing is held, and that where the review is not made after a quasi-judicial hearing required by statute or law, the proper test is whether there is a rational basis for the administrative order.

When the Court of Appeals' decision in the Matter of Pell is read in conjunction with its decision in Bergstein, it becomes quite clear that the Court of Appeals has very forceably and distinctly said, without dissent, that school districts do have a right to separate employees from employment and that these decisions will be upheld by the courts.

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